Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies	)	MM Docket No. 98-204

TO THE COMMISSION

REPLY COMMENTS OF EEO SUPPORTERS

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American Federation of Television and Radio Artists */
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Black College Communication Association */
Black Entertainment and Sports Lawyers Association
Black Entertainment and Telecommunications Association
Civil Rights Forum on Communications Policy
Cleveland Talk Radio Consortium
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Minorities in Communications Division of the Association for Education in Journalism and Communications
Minority Business Enterprise Legal Defense and Education Fund

NAMIC, Inc. (National Association of Minorities in Communications)
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium

[Organizations continued on following page]

COMMENTS OF EEO SUPPORTERS
MM Docket No. 98-204

Commenting Parties (continued)

National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association of Hispanic Journalists
National Association of Hispanic Publications
National Bar Association
National Council of Hispanic Organizations
National Council of La Raza
National Council of the Churches of Christ in the United States
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Latino Telecommunications Taskforce
National Newspaper Publishers Association
National Urban League
Native American Journalists Association
Native American Public Telecommunications */
Puerto Rican Legal Defense & Education Fund
San Diego Community Broadcasting School, Inc.
Telecommunications Research and Action Center
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

May 29, 2002

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*/ Leave is respectfully requested to include the American Federation of Television and Radio Artists (AFTRA), the American Civil Liberties Union (ACLU) and Native American Public Telecommunications as signatories to the EEO Supporters' April l5, 2002 Comments, nunc pro tunc. Further, please correct a misspelling in the name of one of the EEO Supporters in our Comments: it is Black College Communication Association (not "Communications" Association).

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Summary

The forty-eight organizations represented here, along with a host of other supporting groups, include most of the nation's leading civil rights, religious, minority and women's organizations and minority broadcast organizations, as well as labor, media professionals, communications scholars, and cable television organizations. Their comments demonstrate why we need strong EEO enforcement now more than ever, how an EEO rule can be crafted and enforced fairly, and how the Commission can ultimately put an end to discrimination in the electronic mass media.

These Reply Comments include a dramatic and disgusting smoking gun: many broadcasters have actually stopped putting EOE -- "equal opportunity employer" tags on their job notices. MMTC visited the 34 accessible state broadcast association websites that had job postings, as well as NASBA's site. Of 837 listings on all 35 accessible sites, 348 (42%) did not have EOE notices. From 1969 through 1998, essentially all broadcast job notices had EOE tags, as had been expected in license renewal EEO certifications. Although NASBA and the NAB claimed the industry has not been "backsliding" since the EEO rules were first suspended in 1998, the truth is many broadcasters have actually gone to the trouble of taking down their representations to the public that all are welcome to

apply and be considered equally. This highly disturbing trend illustrates exactly why we need a strong new EEO rule now.

The proposed regulations are clearly written and easy to observe. The portions of earlier rules found objectionable by the Court have been excised. Nonetheless, the NAB and the state broadcast stations, while professing their distaste for discrimination, have filed comments which nowhere ask "how can we finish the job of fully integrating the broadcasting industry" or "how can we help bring the discriminators in our business to justice." Instead, they say that the way to stop lawlessness is to hamstring the constable. They trumpet a "marketplace" solution that their own members have yet to embrace. They claim there is "no evidence" of discrimination, while overlooking mountains of such evidence in the record of this proceeding. And they maintain that thirty years of progress, brought about by law enforcement, justifies less law enforcement even though the task remains far from finished.

One of the more noxious proposals advanced in this proceeding was a suggestion by the NAB which -- in its fine print -- would allow a broadcaster to comply with the outreach rules by simply making two small corporate donations every year, while doing no job recruitment at all. An even more troubling suggestion by the state associations was to allow a broadcaster to withhold from public recruitment 50% of its job vacancies -- any 50%, chosen entirely by the broadcaster and not subject to review. The other 50% would only need to be posted on the Internet -- presumably by the same broadcasters

that are tripping over themselves to delete the three letters, "EOE" from their job listings. Guess which jobs they will post, and which ones they will reserve for the traditional, old boy treatment.

Faced with powerful EEO opponents, the Commission has displayed remarkable resiliency, fortitude and integrity. And the Commission is not alone: the leading broadcast companies have not opposed (and many have quietly supported) the EEO proposals. The cable industry has displayed maturity and conscience by its steadfast support for the Commission's proposals.

This is the time to choose competition over covert prejudice, diversity over discrimination, remediation over resegregation. From its high policy perch the Commission can look back in time forty-eight years, to 1954, and remember the Supreme Court pointing us to the the high road. Its decision transformed this nation, inspiring a host of federal agencies and departments to develop civil rights policies for their regulatees. The FCC can forever take pride that in 1968, it was the first agency to display its moral will and authority in civil rights.

From the mountaintop the Commission can also peer 48 years into the future, to the year 2050 when the Census Bureau predicts that the nation will be majority-minority. As every South African knows now, a nation in transformation must plan ahead to ensure that all its citizens have the opportunity to participate at all levels of government and industry. Forty-eight years is such a short time. Thirty-four calendars have

closed since l968, yet the industry most central to our democracy has not reached the Promised Land.

To help get us there, we make these key points:

1. The proposed regulations are constitutionally noncontroversial and statutorialy compelled.[1/]

2. The FCC, and no one else, is capable of bringing about equal employment opportunity in broadcasting.[2/]

3. Overwhelming evidence shows that many broadcasters discriminate. Any discrimination should be deemed unacceptable and abhorrent in an industry so critical to democracy.[3/]

4. If broadcasters genuinely oppose discrimination, they should report discriminators in their midst to the FCC. Not once, ever, has a broadcaster done this, although they report all manner of other rule violations by their competitors. Perhaps there is a gentlemen's agreement to wink and nod at one anothers' lawlessness when it comes to race and gender exclusion. If broadcasters were really as serious in their opposition to discrimination as they profess to be, they should clean up the industry's house. Instead of fighting antidiscrimination laws, they should fight discrimination.[4/]

5. The proposed rule is neither onerous nor complex.[5/]

1/ See pp. 7-18 and 39-73 infra.

2/ See pp. 7-18 infra.

3/ See pp. 24-34 infra.

4/ See pp. 35-36 infra.

5/ See pp. 39-72 infra.

6. No one would be disadvantaged if the Commission gathers research and enforcement data. However, the annual employment reports issue should be moved into its own docket. In that way, its primary purpose will be clearly understood to be research rather than enforcement, and the Commission can develop a record that includes the views of its sister agencies and departments.[6/]

7. The very concept that broadcasters should be exempt from EEO compliance is deeply flawed. EEO compliance is a privilege, not a "burden." Discrimination is a burden, and the risk that discrimination will not be prevented is a burden. Proposals to exempt small stations, small market stations and public agencies are without merit. A Free Exercise clause issue, raised by a party seeking an exemption for religious broadcasters, is not frivolous, but it should be severable from the remainder of the Commission's decision.[7/]

8. The NAB's and state associations' alternate recruiting proposals are neither credulous nor constructive. Notably, NASBA has proposed that a broadcaster could hold back half of the jobs from broad outreach, with no accountability whatsoever, and the NAB has proposed a plan that would allow a broadcaster to do no recruitment at all. These proposals would ensure that discriminators will never be brought to justice and that broad recruitment will never become the industry norm.[8/]

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6/ See pp. 53-72 infra.

7/ See pp. 73-82 infra.

8/ See pp. 83-95 infra.

9. The Commission should expressly identify all portions of the rule that it regards as severable.[9/]

10. Since a weak rule will not stave off an appeal, the Commission should adopt a rule in which it can take pride.[10/]

If the EEO rule takes effect, those who opposed it will wonder what on earth possessed them to waste so much time and cut down so many trees fighting something that does so much, so easily, to build the industry's competitiveness and diversity.

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9/ See pp. 96-97 infra.

10/ See pp. 97-99 infra.

The forty-eight organizations whose names appear on the cover ("EEO Supporters") respectfully offer these Reply Comments.[11/]

Introduction

NASBA and the NAB, powerful trade organizations in the most influential regulated industry, have offered up proposals so radical that if implemented they would resegregate the industry and hide from justice all but the few openly declared discriminators. These trade organizations have patently disregarded the Commission's stated intention not to "modify the rules in a way that would compromise our goal of ensuring broad and inclusive outreach in the community for virtually all full-time job vacancies."[12/]

When counseling his decent but timid fellow clergymen, Dr. King often observed that when someone begins a conversation by professing her support for integration, the next word invariably will be "wait."[13/] We were reminded of this first rule of civil rights while reading the first sentence of NASBA's Comments, which maintains that the state associations "strongly believe that any

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11/ The views expressed in these Reply Comments are the institutional views of the commenting organizations, and are not intended to reflect the individual views of each officer, director or member of these organizations.

12/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second Notice of Proposed Rulemaking), 16 FCC Rcd 22843, 22850 ¶21 (2001)

("Second NPRM"). References herein to the comments of any party, unless otherwise specified, refer to its initial comments, filed on or about April l5, 2002, in response to the Second NPRM.

l3/ Letter from a Birmingham Jail (l962) ("For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that 'justice too long delayed is justice denied.'")

form of illegal employment discrimination is noxious and intolerable - and that all broadcasters should be equal opportunity employers."[14/] But sure enough, almost every other word in its pleading was nothing but the word "wait." The civil rights organizations have seen this again and again -- pious protestations of belief in Dr. King's dream, followed by massive opposition on any and all conceivable grounds to even the most modest laws and regulations that would proscribe, prevent or punish discrimination.

Nowhere in the comments of NASBA and the NAB are there answers to the questions "how can we finish the job of fully integrating the broadcasting industry" and "how can we help bring the discriminators in our business to justice?" Instead, their comments focus only on these absurdly irrelevant non-issues:

- How can the Commission weaken this? 15/
- How can as many broadcasters as possible be exempt from this? 16/
- How can the Commission prevent the public from helping enforce this? 17/

14/ NASBA Comments, p. i (first sentence).

15/ See, e.g., NASBA Comments, pp. 47, 54 (seeking to allow broadcasters to hold back half their jobs from broad recruitment); NAB Comments, pp. 22-24 (proposing a plan under which a broadcaster could be deemed to comply with the rules even if it does no recruiting and just makes two corporate donations every year).

16/ See, e.g., NAB Comments, pp. 54-58 (seeking exemption for "small" broadcasters).

17/ See NAB Comments, p. 36 (urging Commission, in effect, to carve out EEO as the only subject that cannot be considered in connection with license renewals).

- How can broadcasters, including discriminators, never be held to account for violating this? 18/
- What hypothetical might convince a court, unfamiliar with how broadcasting really works, that the discriminated- against minority really is incumbent broadcasters? 19/

NASBA and NAB have evidently been emboldened by split court decisions on two issues that fall at the periphery of the regulations.[20/] These two issues have each been mooted by the approach taken in the Second NPRM. Yet notwithstanding the absence of any genuine constitutional issues affecting the Second NPRM, NASBA and NAB continue to display a propensity to sacrifice other people's well being for their asserted constitutional principles.

EEO regulation from 1971 to 1998 injured no one, and enriched broadcasters immensely by broadening the range of talent in the industry. Nonetheless, some broadcasters seem obsessed with the notion that even a highly diluted version of the 1971-1998 EEO rule should be fought harder than issues that have infinitely more economic impact on broadcasting than the cost of some e-mails of

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18/ See, e.g., NASBA Comments, p. 10 (seeking to deprive the FCC of authority to investigate discrimination cases).

19/ See NAB Comments, p. 70 ("the Commission has noted cited to any proof of a pattern of discriminatory hiring in the broadcasting industry"); NASBA Comments, pp. 39-42 (suggesting, inter alia, that the determination of what is a "homogeneous" workforce, for the purpose of evaluating whether word of mouth recruitment from a homogeneous workforce is discriminatory, renders EEO regulation race-conscious).

20/ Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.) ("Lutheran Church"), rehearing and rehearing en banc denied, 154 F.3d 487 (D.C. Cir. 1998); MD/DC/DE Broadcasters Ass'n. v. FCC, MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13 ("MD/DC/DE Broadcasters"), petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTC v. FCC, ___ U.S. ____, 122 S.Ct. 920 (2002).

job notices and a few annual forms.[21/] Even some northern broadcasters appear still to be fighting the Civil War.[22/]

Faced with powerful EEO opponents, the Commission has displayed remarkable resiliency, fortitude and integrity. And the Commission is not alone in holding firmly to the course of equal opportunity. The leading broadcast companies have quietly supported the FCC's regulatory program, either by continuing to abide by it voluntarily (as over 20 major companies have done,

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21/ E.g., digital satellite radio, DTV transition, lowest unit charge, Internet royalties, multiple ownership.

22/ See "FCC's Stewart Quizzed by Pa. Broadcasters on EEO," Communications Daily, May 21, 2002, pp. 2-3 (reporting that "Roy Stewart, chief of FCC Office of Bcst. License Policy, didn't once mention EEO during his presentation [May 20, 2002] at Pa. Assn. of Bcasters. (PAB) -- but that was subject of every question but one he received[.]")

including all six major TV networks), by endorsing it publicly,[23/] or by filing supportive briefs or comments.[24/] Further, virtually the entire cable industry has consistently supported the regulations,[25/] even though compliance for cable companies entails far more work than does compliance for broadcasters. Over a dozen

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23/ See Keynote Address of Lowry Mays, Citizenship Education Fund Media Advocacy Conference, Washington, D.C., March 27, 2000 (Trans. p. 6) ("the new FCC employment rules [are] certainly not important for Clear Channel. We began our affirmative action program some thirty years ago, and we have maintained that as a central focus of our company for a long time. However, we don't live in a perfect world, so we support this initiative"); Declaration of Jeffrey H. Smulyan, Chairman, Emmis Communications Corporation, March l7, l999 (EEO Supporters Comments in MM Docket No. 98-204, filed March l9, l999) ("l999 EEO Supporters Comments"), Vol. III, Exhibit 20 ("[a]s an industry we are not good about recruiting people into the business....The industry has made an effort but the whole outreach notion is a foreign one. We as an industry have to be better at attracting minorities because we don't have enough of them in the talent pool); Statement of Dennis Swanson, President, WNBC-TV, New York, l999 EEO Supporters Comments, Vol. III, Exhibit 2l ("[h]opefully, a station's workforce will reflect the population it is servicing. It believe this is a 'win-win' situation because our business is determined by ratings and a broader audience should translate to financial success.") Further, some companies have contributed constructively in this proceeding. Notably, Cox Communications filed an outstanding illustration of what a model Internet recruiting site might look like. See discussion, p. 9l infra. If more companies invested the resources, care and creativity reflected in Cox Communications' site, Internet recruiting may yet make a significant contribution to the desegregation of broadcasting.

24/ See, e.g., Radio One Comments, pp. 2-4 (describing how companies benefit from conducting broad outreach).

25/ See, e.g., National Cable and Telecommunications Association

(NCTA) Comments, pp. 9-12 (endorsing and describing the benefits of broad outreach for every fulltime vacancy).

leading organizations in the broadcasting industry have enthusiastically supported the regulations.[26/]

The electronic mass media is far too critical to democracy to sacrifice to resegregation. It is America's signature industry, serving as the mirror through which the rest of the world forms its opinions about us.

Sometimes, when something is worth fighting for, a long struggle must be waged. The King Holiday required seventeen sessions of Congress before passage, and during that time its supporters faced scores of contrived objections: it would ruin the economy; it would dishonor presidents who didn't have a holiday; it would be "affirmative action." But after the first holiday, all of the objections proved to be without merit. Similarly, if the EEO rule is allowed to take effect, those who opposed it will wonder what on earth possessed them to waste so much time and cut down so many trees fighting something that does so much, so easily, to build the industry's competitiveness and diversity.

26/ See EEO Supporters Comments (joined in by, inter alia, the Alliance for Community Media, the American Federation of Television and Radio Artists (AFTRA), the American Hispanic Owned Radio Association, the Black College Communications Association, the Minorities in Communications Division of the Association for Education in Journalism and Communications, the National Association of Minorities in Communications (NAMIC), the National Association of Black Owned Broadcasters, the National Hispanic Media Coalition, and all five organizations of minority journalists); see also American Women in Radio and Television Comments, pp. 7-13 (advocating broad outreach for all vacancies).

I. The Proposed Regulations Are Constitutionally Noncontroversial And Statutorially Compelled

A. The FCC Is Authorized And Mandated To Prevent Discrimination In Broadcasting

1. Congress Required The FCC To Prevent Discrimination in Broadcasting

In Lutheran Church and MD/DC/DE Broadcasters, the Court was not asked to strike down an Act of Congress, nor did the Court do so sua sponte. Thus, NASBA is incorrect in suggesting that Congress must vote to reaffirm its findings or to reenact statutory provisions requiring or ratifying FCC EEO regulation.[27/]

It is well established that when a court holds an agency rule implementing a statute to be unconstitutional, Congress' original enactment is not voided.[28/] Nor are Congressional findings of fact wiped off the slate because of a court ruling that did not dispute those facts.

NASBA is also incorrect in suggesting that the Commission's suspension of the rule after MD/DC/DE Broadcasters overrode or superseded an Act of Congress.[29/] The Commission is incapable of performing such a feat. By temporarily suspending EEO regulation

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27/ See NASBA Comments, p. 31.

28/ See,e.g., DeBartolo Corp. v. Florida Gulf Coast Building, 485 U.S. 568 (1988) (when the Court has determined that an agency's interpretation of a statute is unconstitutional, every reasonable construction "must be resorted to, in order to save a statute from unconstitutionality" (citing Hooper v.

California, 155 U.S. 648, 657 (1895)). As the Commission has noted, Section 334 prevents it from revising requirements not invalidated by the court. Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329, 2389 ¶149 (2000) ("First R&O"), recon. denied, 15 FCC Rcd 22548 (2000) ("Recon"), reversed in part on other grounds in MD/DC/DE Broadcasters.

29/ See NASBA Comments, p. 5.

in order to avoid constitutional pitfalls while seeking to develop a new rule, the Commission did not offend a statute, much less purport to overrule it.[30/]

Finally, as it was modifying its 1971 EEO regulations so as to eliminate aspects deemed unconstitutional by the Court, the Commission also made slight adjustments to the rule so that it would retain the direction, strength and internal cohesiveness Congress originally expected.

The Commission can hardly be faulted for trying, without violating the Constitution, to come as close as possible to what Congress required. Congress has not objected to the Commission's approach. Indeed, in none of the several hearings on broadcast regulation since 1999 has Congress called into question the Commission's faithfulness to congressional intent on EEO. If Congress feels the new regulations are not sufficiently faithful to its commands, it will certainly say so.

Not only is the Commission's approach faithful to the pre-1996 statutory provisions and findings, it is faithful to two key provisions of the 1996 Act -- the amendments to Section 151, which require the Commission to regulate so as to avoid, inter alia, race

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30/ An agency's interpretation of its own statute is entitled to deference unless it is unreasonable. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837

(1984). A revised interpretation of the statute is also entitled to deference where an agency adapts its rules to changing circumstances. Rust v. Sullivan, 500 U.S. 173 (1991). No one could seriously contend that a court decision striking part of a rule on constitutional grounds is not a changing circumstance that an agency is permitted to address in refashioning its rules.

and gender discrimination in the industry;[31/] and Section 257, which requires the Commission to periodically review its rules so as to eliminate market entry barriers.[32/] Even if Congress had never spoken previously on the subject of EEO, these provisions, by themselves, contain ample authorization for the Commission in its discretion to choose EEO regulation as a means of proscribing discrimination, preventing discrimination and eliminating discrimination as a market entry barrier.

2. No One But The FCC Is Able To Act Effectively To Proscribe And Prevent Discrimination In Broadcasting

In a recent law review article, Commissioner Abernathy wrote that "[a]n important corollary of my preference for a regime with fewer, clearer rules is my belief that the FCC needs to place greater emphasis on enforcement of the basic rights afforded by the statute."[33/] In no field is this point better taken than in civil rights. Other agencies can triage some individual EEO complaints, but no one but the FCC has the expertise, the congressional mandate or the moral authority to act effectively to proscribe, and to prevent race and gender discrimination in broadcasting.

31/ See 47 U.S.C. §151 (1996) (creating the FCC, inter alia, "so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (emphasis added).

32/ See 47 U.S.C. §257(b) (l996) (establishing a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.")

33/ Kathleen Q. Abernathy, "My View from the Doorstep of FCC Change," 54 Fed. Comm. L. J. l99, 2l4 (2002) ("Abernathy").

In 1968, realizing that the glacial Title VII process would never lead to the integration of broadcasting, the Commission adopted its first EEO regulations.[34/] In the Commission's 1969, 1971, 1972, 1975, 1984, 1987, 1994, 1996, and 1999 EEO rulemaking proceedings and inquiries, EEO opponents contended that the existence of the EEOC makes FCC regulation unnecessary or

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34/ Nondiscrimination in the Employment Practices of Broadcast Licensees (MO&O and NPRM), 13 FCC Rcd 766, 776-77 (1968) ("1968 EEO MO&O and NPRM"). Therein the Commission relied on the "Pollak Letter," whose contents bear repeating:

> [An] argument against the proposed rule might be that the Commission should concern itself with broadcasting, and not with matters of racial or other discrimination. In view of the national policy against such discrimination, the critical importance of reducing it as soon as possible, and the responsibility of the Commission has to encourage and require the broadcasting industry to serve the public interest, I do not believe that this contention should be given substantial weight.
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> Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries. For these reasons I consider adoption of the proposed rule, or one embodying the same principles, a positive step which your Commission appears to have ample authority to take....
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> Sincerely,
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> Stephen J. Pollak
> Assistant Attorney General,
> Civil Rights Division,
> Department of Justice,
> Washington, May 21, 1968.

redundant.[35/] And once again, EEO opponents have trotted out their EEOC/redundancy contention.[36/] This argument has always been poorly taken, for reasons that bear repeating.

First, Title VII's purpose is far more limited than the FCC's EEO rule's purpose. Title VII is aimed at making whole the very rare individual who knows she may have been a victim of discrimination and who is willing and able to risk her career to fight it. In broadcasting, no EEOC intervention is possible unless a very highly motivated, financially endowed individual, who knows and can prove that she personally was a victim of discrimination, is willing to fight for years and risk her career in a close-knit industry.[37/]

The most common discriminatory practice in broadcasting -- word of mouth recruitment conducted in an exclusionary manner -- is by definition not knowable by its victims, because the practice

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35/ See, among others, First R&O, 15 FCC Rcd at 2360-61 ¶69 ("[w]hile the EEOC and the FCC share as a common goal the elimination of discriminatory employment policies and practices at broadcast stations and cable systems, the primary functions of the two agencies are different. Whereas the FCC reviews discrimination complinants for the purpose of providing releif to victims of discrimination, either individually or as a group, and deterring future discrimination, the FCC's principal concern in reviewing discrimination allegations is the fitness of broadcasters and cable entities to fulfill their obligations under the Communications Act); Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices (R&O), 18 FCC2d 240, 241 (1969) ("1969 Nondiscrimination R&O") ("[a]ction by the Commission will complement, not conflict with, action by bodies specially

created to enforce" the national policy against discrimination.)

36/ See, e.g., NASBA Comments, p. 31 ("[t]here is no evidence that the nondiscrimination laws on the books...are inadequate to deter discrimination.")

37/ See EEO Supporters Comments, pp. 41-47.

works by ensuring that discriminatees never learn of the job itself, much less that they will not be considered for the job.[38/] But even if an individual knew she had been discriminated against, the FCC could not make her whole. Instead, FCC EEO regulation is aimed at ensuring that systemic discrimination does not endanger the integrity, competitiveness and diversity of the industry most critical to the maintenance of democracy.[39/] The EEOC lacks the resources or the statutory mandate to undertake or supervise the prevention of discrimination in a specialized industry. The FCC's forward-looking jurisprudence is ideal for a preventive purpose.[40/]

Second, it is grossly unrealistic to expect that the FCC's ability to review final EEOC or judicial determinations is

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38/ As we have noted, most discrimination is covert. See Comments of EEO Supporters, p. 42. Title VII provides little protection against an employer who posts jobs on the Internet but actually throws away the applications of minorities or women, since a minority or female applicant will have no way of knowing that she had no chance of being considered.

39/ See EEO Supporters Comments, pp. l4-34.

40/ It is the difference in regulatory purpose that renders NASBA's comparisons with other agencies inapt. See NASBA Comments, p. 37, which analogizing the FCC/EEOC relationship to the FCC's relationships to the FAA, EPA and State Department. The FCC lacks the expertise to know whether a tower violates aviation rules, or whether a communications installation will endanger the environment, whether a foreign national with a communications authorization might jeopardize

national security. But as explained infra, pp. 16-18, the FCC has more than sufficient expertise to evaluate whether a broadcaster has discriminated.

NASBA does make the surprising point that it would be even better to rely on the EEOC than the FCC to investigate pattern and practice complaints. See NASBA Comments, p. 37. We are certain that broadcasters would object strenuously if petitions to deny alleging patterns and practices of discrimination were sent to the EEOC for investigation. In no instance has a respondent in a petition to deny pattern and practice case ever moved the FCC to have the EEOC conduct an investigation of the allegations in the petition to deny.

sufficient to deter discrimination.[41/] As we have noted, in practice there has only been one instance in thirty years when a final order came back to the FCC for licensing review, and by then -- seventeen years after the case began -- the license had changed hands four times.[42/] The EEOC's resources are slight,[43/] its backlog huge,[44/] its employee-numerosity threshold is high,[45/]

41/ See Curators of the University of Missouri ("Curators") Comments, p. 6 ("following adjudication involving discrimination...the Commission has the power to determine if the facts militate for [sic] FCC penalties up to and including loss of license" (fn. omitted)); see also NASBA Comments, p. 35.

42/ The case involved WSM Radio, Nashville, TN. It was brought in l973 and not finally resolved until l990, when all appeals were concluded. Three African Americans were found to have been discriminated against by the radio station beginning in l970.

43/ The total EEOC budget for FY 2002 is $3l0,406,000. The President's request for FY 2003 is $323,5l6,000. At the close of FY 200l, the total number of EEOC staff nationwide, including those in headquarters and field offices, was 2,704. See www.eeoc.gov/budget.html. Thus, the EEOC is approximately the same size as the FCC. The EEOC's budget must cover the agency's entire costs to prosecute employment discrimination allegations in every industry in the nation -- in a nation in which about 20-25% of firms discriminate. See EEO Supporters Comments, pp. 39-40 n. l09.

44/ According to the EEOC's Charge Data System, Office of Research, Information and Planning (February 22, 2002), under Title VII, in each year between l992 and 200l there were between 55,388 and 62,8ll charges received. In 2000 and 200l, considerably more changes were received than were resolved; in 200l, 59,63l charges were received and 54,549 were resolved. In 200l, only 5,0l4 charges (9.2%) resulted in a reasonable cause finding, and there were ll,708 (2l.5%) merit resolutions. As AFTRA notes, the EEOC "is still facing a backlog of over 6l,000 cases" and "cannot investigate or

prosecute all meritorious claims of discrimination, and with this backlog, it is certainly not in a position to evaluate discrimination complaints for the purpose of ascertaining trends in any particular industry." AFTRA Comments, p. l2.

45/ The EEOC's jurisdictional threshold is fifteen employees. 42 U.S.C. §2000e(b). A high proportion of radio stations, and some television stations and cable systems don't have that many employees. Stations with fewer than fifteen employees are typically the initial points of entry for women and minorities, and therefore should be among the least likely candidates for EEO immunization. See discussion at pp. 74-77 infra.

its statute of limitations is far shorter than an FCC license term,[46/] and its processes virtually ensure that even the most determined complainants will be worn down or destroyed.[47/] Even when a complainant wins a judgment and secures a financial reward, she has no incentive to then take the additional step of refusing the broadcaster's offer of an additional payment in exchange for allowing the decision in her case to be vacated in order to rob the FCC of the ability to review it.[48/] Finally, compulsory arbitration provisions ensure that the EEOC will never even know about allegations of disrimination.[49/]

Third, Congress chose to endow the FCC with EEO authority, being aware, obviously, that the EEOC also has EEO authority.[50/]

46/ The statute of limitations for Title VII is 300 days for jurisdictions with a Section 706 agency, and 180 days otherwise. 42 U.S.C. §2000e-5(e)(1).

47/ A Title VII complainant must wait at least 180 days after the filing of the charge. 29 C.F.R. §1601.28(a)(2). During that time, the person still does not have the job she sought, or she has to go to work every day and face those alleged to have discriminated against her on the job. See EEO Supporters Comments, p. 43.

48/ Under the Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission (R&O), 70 FCC2d 2320, 2331 §IV (1978) ("FCC/EEOC Agreement"), upon completing its review of an EEO complaint, the EEOC will report back to the FCC -- if there is anything to report. In our experience, a prudent broadcaster, having lost a case at the EEOC or in court, and having been required to pay a complainant (e.g.) $100,000, will approach the complainant and offer to forego further appeals, pay immediately an amount equal to the judgment, and pay a bonus of $10,000 if the complainant will join in a motion to vacate

the judgment. No one but the most bitter (and independently wealthy) complainant will turn down such an offer. That is how the FCC is always deprived of any knowledge that these cases even existed.

49/ See discussion in EEO Supporters Comments, pp. 75-78.

50/ See 47 U.S.C. §§334, 634 (l992).

Indeed, when Congress created the EEOC, many states and municipalities operated fair employment agencies with powers similar to those of the EEOC.[51/] Recognizing this, Congress included as Section 706 of the 1964 Civil Rights Act a procedure for crossfiling and jurisdiction sharing, thereby ensuring nonredundancy even where two government agencies had exactly the same mission.[52/] Thus, Congress has made the decision to vest EEO authority in several venues rather than having a single national EEO Czar. The FCC and the EEOC have harmonized their respective missions through the FCC/EEOC Agreement, which ensures that the work of the two agencies does not overlap.[53/] Virtually every employment discrimination complaint received by the FCC is already sent over to the EEOC, leaving the FCC to consider only allegations of systemic practices that do not involve requests for individual make-whole relief. Since 1985, no party has ever asked the FCC and EEOC to repeal or revise the FCC/EEOC Agreement.

Perhaps, someday, Congress will expand the EEOC's mission, lengthen its statute of limitations, lower its employee-numerosity jurisdictional threshold, and expand its remedial powers to correspond with the FCC's mission, jurisdictional parameters and remedial powers. Further, perhaps someday Congress will fund the

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51/ The first such agency was created in 1948 by the City of Minneapolis to administer an ordinance written by Mayor

Hubert H. Humphrey. That ordinance later formed the basis for Title II, Title VI, Title VII and Title VIII of the l964 Civil Right Act.

52/ See 42 U.S.C. §706 et seq.

53/ See FCC/EEOC Agreement, discussed in EEO Supporters Comments, pp. 46, 75-78.

EEOC sufficiently to allow it to resolve cases with reasonable speed. Until then, however, reliance on the EEOC would immunize almost all discriminators in broadcasting from accountability.

3. The FCC Has Ample Expertise In EEO Enforcement

In 1968, the FCC became the first federal agency to assume responsibility for the EEO compliance of its regulatees. The first sentence of the Communications Act underscores the FCC's responsibility to ensure that the nation's electronic media operate without race and gender discrimination.[54/] In light of the FCC's EEO pedigree, it is not surprising that AFTRA, the organization with the most day to day experience with broadcast employees' civil rights, concludes that "[t]he Commission is the agency uniquely qualified to investigate and address complaints of employment discrimination in the broadcast and cable industries."[55/] Nonetheless, two commenters suggest that the FCC lacks the expertise to adjudicate allegations of discrimination.[56/] Neither commenter cites one case in which the FCC displayed this supposed lack of expertise.

The FCC has operated an EEO enforcement unit for thirty years -- longer than many state and municipal human rights agencies. One of its commissioners went on to head the NAACP; another chairs the Minority Media and Telecommunications Council. One of its former

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54/ 47 U.S.C. §151 (1996).

55/ AFTRA Comments, pp. 12-13.

56/ See NASBA Comments, p. 36 (maintaining that the FCC lacks expertise in this "complicated area of law.") See also Curators' Comments, p. 5.

general counsels has mentored civil rights lawyers far too numerous to recite, and at least seven former FCC commissioners and over a dozen other former FCC senior officials have served as directors or officers of national minority and civil rights organizations.

Apart from the EEOC itself, no other independent agency has given the civil rights world so many of its distinguished alumni.

The FCC has developed an extraordinary body of civil rights jurisprudence, rendering decisions that cover virtually every significant issue arising in employment discrimination law. Pike & Fischer Radio Regulation and Pike & Fischer Communications Regulation (1969-2001) contain 364 citations to significant FCC EEO published opinions. That is almost one decision every month. This body of law is considerably more extensive than the output of many civil rights enforcement agencies. And while Lutheran Church and MD/DC/DE Broadcasters have garnered a lot of attention, the truth is that the FCC almost always wins its EEO cases in the D.C. Circuit.[57/]

The FCC's application of its EEO forfeiture authority is uncommonly even-handed.[58/] Its EEO case backlog (during renewal periods) of about three years is long, but compares favorably with the EEOC's seven year backlog. From an enforcement standpoint, the

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57/ See, e.g., Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 27l, 274 (D.C. Cir. l994) and Tallahassee Branch of the NAACP v. FCC, 870 F.2d 704, 707 (D.C. Cir. l989) (each holding that Commission has discretion to decline to investigate allegations that recruitment methods were inadequate).

58/ See MMTC, FCC EEO Forfeitures, l990-l996 (l996) (discussed in the l999 EEO Supporters Comments, pp. 20l-204) (finding that forfeitures amounts fell on an almost perfect bell-shaped curve, and that the amounts of forfeitures and choices of sanctions were uncorrelated with any extraneous factors, including station type, station size, or market size).

FCC's track record for EEO case processing is actually somewhat superior to the EEOC's record.[59/]

EEO is complex, but no more complex than separations and settlements, CLEC entry, DTV deployment, and scores of other esoteric issues that the FCC's gifted staff has mastered. Indeed, it is the FCC's intimate knowledge of the day to day operations of the industries it regulates that helps make the FCC the most qualified agency to adjudicate EEO issues. FCC commissioners understand broadcasting and broadcasters better than anyone else in Washington. Broadcasters frequently interact with the FCC commissioners at state and national broadcast conventions. However, most broadcasters probably could not name the Chair of the EEOC, and it has been years since an EEOC commissioner visited the NAB Convention. Who but the FCC can better understand when an EEO regulation is either ineffective or excessive, or better appreciate the difficulties in attracting and retaining high quality staff? Who but the FCC can better appreciate whether a close-knit broadcast industry engages in word of mouth recruitment, or blackballs whistleblowers and complainants?

Civil rights organizations have often taken issue with the FCC's lassitude in enforcement, but the FCC's shortcomings have

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59/ See MMTC, "FCC EEO Enforcement, 1994-1997" (1998) (discussed in the 1999 EEO Supporters Comments, pp. 204-

212) (finding that of the 251 non-hearing EEO enforcement rulings, the Commission absolved the licensee in 96 cases (38%), issued a caution or admonishment in 37 cases (15%), issued conditional renewals without forfeitures in 32 cases (13%), issued a conditional renewal with a forfeiture in 65 cases (26%) and issued a conditional short term renewal and a forfeiture in 21 cases (8%). By comparison, at the EEOC in 2001, 21.5% of the charges were resolved with merit resolutions, 9.2% with reasonable cause findings and 58.8% by no reasonable cause findings; the rest were conciliated.

been for want of will, not for want of expertise. At its best, the FCC's skill and its moral authority in the industry have combined to make the agency one of the federal government's most effective instruments for equal opportunity.

B. There Are Ample Affirmative Justifications For The Rule

1. A Finding That All Broadcasters Discriminate Is Not A Necessary Predicate For A Preventive Rule

Some commenters opposing the rule posit that the Commission must show that the "industry" discriminates before the FCC can adopt a rule to deter discrimination.[60/] Another commenter draws the remarkable conclusion that "the Commission essentially has admitted that no pattern of discrimination in the broadcasting industry [sic]."[61/] One commenter even suggests that "the climate that caused the FCC to adopt the EEO rules in the late 1960s simply

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60/ See, e.g., NASBA Comments, p. 32 ("it simply makes no sense for the FCC to regulate the industry's recruitment and hiring practices to prevent some imagined homogeneous workforce from 'replicating' itself. Certainly, there is no evidence that the broadcast industry as a whole is somehow a 'discriminator'"); id., p. 12 (EEO regulations are "unnecessary because the broadcast industry's existing practices already reflect the intended desired behavior"). NASBA also states that "[s]ince *Lutheran Church*, the Commission has not produced - and cannot produce - any evidentiary record of industry-wide problems relating to broadcast industry recruitment[.]" Id. Actually, there is extensive evidence of backtracking since Lutheran Church, including broadcasters' failure to use their own state associations' recruitment websites. See EEO Supporters Comments, Exhibit 2 (Summary of Content of State Broadcast

Associations' Website Employment Pages); see also the smoking gun discussed at pp. 28-31 infra.

61/ NAB Comments, p. 67. The NAB finds this "admission" in the fact that the FCC has not revoked broadcast licenses. Id. By this contorted logic, if the DEA does not interdict drug shipments, the DEA has "admitted" that no drugs are coming into the country. If the NAB's members would tell the FCC what they know about discriminators in their midst, perhaps the FCC would indeed revoke more licenses and clean up the industry. See pp. 35-36 infra.

no longer exists"[62/] and another makes the Orwellian suggestion that broadcasters' progress in EEO because of the EEO rule compels the conclusion that there should, instead, be no EEO rule.[63/]

In the same breath as they claim they have cleaned up their act, these commenters cite no cases holding that a "finding" of an empirically determinable percentage of discriminatees in an industry is a predicate for preventive regulation under rational

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62/ Curators Comments at 4. A major research university ought to be aware that we still live in a "climate" of hate crimes, xenophobia, de facto school and housing segregation, exclusive clubs, prime-time television shows set in New York with no minorities in the cast -- and people targeted for discrimination because of their surnames, religion or national origin.

63/ See NAB Comments, p. 71 (contending that inasmuch as EEO rules were in effect for thirty years, "it should be presumed that these policies have been effective, such that the broadcasting industry's long-standing practices of non-discrimination and affirmative action have produced a workforce that reflects the gender and racial make-up of broadcasters' communities." That is an idyllic dream, but it is not a "presumption" nor is it true. See 1999 EEO Supporters Comments, pp. 46-54 (providing statistics showing profound disparities by race and gender throughout the industry). It took more than thirty years to create a segregated broadcasting industry, and it is taking more than thirty years to desegregate it. Desegregation would happen a lot quicker if broadcasters would begin expose discriminators in their midst. See pp. 35-36 infra.

basis review.[64/] If that were the test, the government would be powerless to prevent employment, housing or public accommodations discrimination, since most of these types of discrimination are unknown and unknowable.

Industries do not discriminate; companies do. As shown infra, industry conditions bear the earmarks of rampant discrimination by many firms. Whether because of present-time discrimination or past discrimination of recent memory,[65/] the Commission has ample

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64/ One commenter even goes so far as to declare that "in the three decades in which the FCC's former EEO rules were continuously in place, the Commission never took up any inquiry into the continuing need for such rules[.]" NASBA Comments, p. 13. That is incorrect. In 1992, Congress required the Commission to conduct an inquiry on, inter alia, "the effect and operation of [the EEO portions of the 1992 Cable Act]" in which the Commission "shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority." Section 22(g) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. N. 102-385, 106 Stat. 1460 (1992). After conducting the required proceeding, the Commission produced the 1994 EEO Report, 9 FCC Rcd at 6276 et seq., which concluded that "there continues to be evidence in cases in which the Commission sanctions licensees that women and minorities are still not recruited for a significant number of positions. In fact, despite our requirements, in many of these cases, for which we have issued sanctions, positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry." (fns. omitted). Id., 9 FCC Rcd at 6314-15 ¶79.

65/ EEO Supporters contended that the government's past history of involvement in the exclusion of minorities from broadcasting was, by itself, sufficient to justify the rules on remedial grounds. EEO Supporters Comments, pp. 22-24. The Lawyers Committee for Civil Rights ("LCCR") makes the additional point that the history of exclusion of minorities "gives the Commission ample cause to believe deterrence and prevention of discrimination are essential." LCCR Comments, p. 16.

authority to deter discrimination. As LCCR explains, even if strict scrutiny applied, "[i]t is well settled that the government has a compelling interest in preventing and deterring impermissible discrimination....the Commission's equal opportunity rules seek to...ensure that [the Commission] has not created a licensing system closed to certain segments of the population on account of race."[66/]

Another variation of the "industry doesn't discriminate" argument is NASBA's contention that since the industry doesn't have an incentive to discriminate, it must be presumed not to be discriminating.[67/] Economists would have little to do if every firm acted according to its incentives, for there would be no such things as risk aversion, externalities and nonpecuniary effects. Since the birth of the Industrial Revolution, the equal opportunity incentive was not powerful enough to prevent slavery, segregation, open discrimination, and (since 1964) covert discrimination.

Today, some businesspeople still believe their true incentive lies on the side of hiring those with whom they feel socially

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66/ LCCR Comments, pp. 6-7.

67/ NASBA Comments at 12 ("[l]ike any industry, the broadcast industry has a strong, inherent incentive to create an active recruiting pipeline to attract a robust stream of qualified men and women from all racial and ethnic backgrounds.") See also Local Television Group ("LTVG") Comments, p. 12 (suggesting that it would be "counterintuitive

and irrational" to suggest that a broadcaster would hire or recruit "from among only [its] 'business and social contacts.'")

comfortable.[68/] Other businesspeople, with more pressing priorities than personnel matters, delegate EEO to subordinates whose real incentive is self-preservation, as opposed to maximizing the company's profits. Such employees may perceive or misperceive that recruiting, interviewing or hiring too many women or minorities would offend the boss' sensibilities.

Personal prejudice, including unconscious prejudice, did not take leave of people's hearts with the "I Have A Dream" speech. The raft of hate crimes proves this. Empirical research proves this.[69/] The 2000 presidential campaign in South Carolina, when the political expedient of kowtowing to neosegregationists caused two good men to embarrass themselves -- proves this.

Broadcasters, who were relieved of ascertainment obligations because they know their communities,[70/] ought to agree that prejudice and discrimination remain rampant, and that no industry, even their own, has not been infected by these most stubborn of viruses.

68/ See 1999 EEO Supporters Comments Comments, p. 15 n. 31 (discussing 1996 National Opinion Research Center survey finding, inter alia, that 44% of southerners believe they should have the legal right to refuse to sell their house to a person because of the prospective buyer's race); id. (noting that in the November, 1998 elections, 38% of South Carolinians voted to retain a ban on interracial marriages in the state constitution); id., pp. 140-41 n. 247 (discussing 1997 Gallup finding that 18% of Whites nationwide do not favor a racially mixed working environment).

69/ See n. 68 supra.

70/ See Deregulation of Radio, 84 FCC2d 979, 998 (1981) (subsequent history omitted)

a. Overwhelming Evidence Shows That Many Broadcasters Are Prone To Discriminate

The FCC has repeatedly found that broadcasters engaged in inherently discriminatory practices such as excessive word of mouth recruitment.[71/] Yet some commenters still deny that this practice is prevalent,[72/] or is even sometimes discriminatory.[73/] At the same time, these commenters seem to be trying to entice the

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71/ See, e.g., Walton Broadcasting, Inc. (KIKX, Tucson, AZ) (Decision), 78 FCC2d 857, 875, recon. denied, 83 FCC2d 440 (1980) ("Walton") and the cases cited in EEO Supporters Comments, pp. 15-16 n. 58, among many others.

72/ See NASBA Comments, pp. 31-32 (claiming there is "no evidence" that word of mouth recruitment in broadcasting "is more extensive than in other industries.") This misses the point, however, since Congress intended broadcasters to observe a higher standard of nondiscrimination ethics than other industries. See, inter alia, 47 U.S.C. §151 (1996) and 47 U.S.C. §334 (1992)

73/ See NASBA Comments, pp. 31-32 ("[t]here is also no evidence that word-of-mouth recruitment...is an inherently discriminatory practice or has led to discriminatory practices by broadcasters in general.") This is not a serious argument. "Word of mouth" means "friend to friend" and "relative to relative" which, almost by definition in a homogeneous workplace, tends to exclude minorities. See, e.g., Garland v. USAir, 767 F.Supp. 715, 726 (W.D. Pa. 1991) ("USAir's maintenance of an all white nepostistic/word of mouth hiring channel has a disparate impact on blacks"); EEOC v. Andrew Corp., 1989 WL 32884 (N.D. Ill. 1989), p. 22 (word of mouth recruiting results in a "violation of Title VII...only when word-of-mouth is coupled with a work force from which minorities have been excluded or in which they are grossly underrepresented", citing Taylor v. Safeway Stores, Inc., 524 F.2d 263, 271 (10th Cir. 1975)); Van v. Plant & Field Service Corp., 672« F.Supp. 1306, 1317 (C.D. Cal. 1987) ("[t]he use of referrals from current employees (as a source of new hires) which tends to perpetuate a low percentage of a disadvantaged group may violate Title VII if it is the employer's primary

means for recruiting applicants. Relying on word-of-mouth or walk in applicants when the only applicants likely to walk in are members of the majority group amounts to unlawful discrimination)"); Montana Rail Link v. Byard, 860 P.2d l2l, l23 (S. Ct. Mont. l993) (word of mouth recruiting by employer was an "affirmative act" that resulted in a disparate imact between male and female applicants.)

Commission into saying something that can be seized upon as "evidence" of an implied racial quota.[74/]

Rather than waste time on such detours, the Commission should focus on the overwhelming record evidence that many broadcasters still discriminate today:

- The statistical representation of minorities and women in the aggregate in the industry is simply unexplainable except by realizing that discrimination has infected broadcast employment. 75/ Indeed, the most common statistics (those drawn from Form 395) mask the fact that about half of the minorities in radio still work for the handful of minority owned stations. 76/ No other explanation except discrimination explains these statistics: minorities and women are no less qualified for, capable of, talented, well trained and interested in broadcast careers than White men.

74/ NASBA says it does not know whether the Commission's use of the word homogeneity "refer[s] to racial, ethnic or cultural homogeneity." NASBA Comments, p. 33. With this too clever argument, NASBA seems to be trying to induce the Commission to utter the word "race" so that NASBA can go to court and say "see, the FCC wants a racial quota." The Commission should refuse the bait. Specifically, the Commission should not confuse racial statistics (which are not at issue in this context) with the issue of word of mouth recruitment among a racially exclusive control group and the friends and relatives of the members of that group. That is a specific discriminatory practice. Racial homogeneity, and the means by which it is replicated, could not be more relevant to race discrimination.

75/ See 1999 EEO Supporters Comments, pp. 45-54; see also NOW Comments, pp. 3-4 (providing additional statistical evidence of the very bleak and declining representation of women in upper level and executive positions in the media, as well as evidence of an increasing salary differential between men and women managers in broadcasting and cable.)

76/ See EEO Supporters Comments, p. 53 n. 124.

- Notwithstanding the high visibility and success of Oprah Winfrey and Bill Cosby, minorities continue to exercise little real influence in broadcasting. In Electronic Media's most recent (September, 200l) listing of the most powerful people in television news, only one person of color (Connie Chung) was named, and she was an "honorable mention." Of the 27 network and local newspeople listed, not one news manager of color was included. Only 4.4% of radio news directors are minorities, as shown in the RTNDA/Ball State University, 200l Survey of Women and Minorities in Radio and Television News. 77/ This means there must be virtually no minority news directors at nonminority owned radio stations.

- Citing EEOC statistics, NOW points out that "[w]omen also tend to be clustered in clerical and administrative support, customer service/consumer affairs, and sales areas in the broadcast and cable industries." 78/

- With over 300 collective bargaining units under contract, AFTRA is in a unique position to be aware of discriminatory practices in the industry. 79/ AFTRA notes that as a result of consolidation, its members "report that minorities and women have been disproportionately affected in these waves of terminations and layoffs." 80/ Further, "AFTRA has also seen a return of the insular, 'word-of-mouth' hiring practices that historically excluded women, minorities and others from applicant pools. It has now become widely perceived that only candidates with some 'inside' connection to networks and stations will have any chance to compete for an available position." 81/

77/ This study can be found in AWRT's Comments as Appx. A.

78/ NOW Comments, p. 3; see also AWRT Comments, pp. 3-6. NOW also points out that while women may hold executive positions, "job titles may overstate actual levels of participation in strategic or programming decisionmaking." Id.

79/ AFTRA Comments, p. 4.

80/ Id, p. l0.

81/ Id.

- Contrary to the suggestion of NASBA that "the broadcasting industry continued to broaden and deepen its outreach over the past two-and-a-half years," 82/ the truth is that broadcasters have backtracked during that time. AFTRA explains that a "disturbing and intolerable trend that [it] has witnessed since 1998 has been that broadcast and cable licensees have sharply reduced their participation in job fairs and other outreach and recruitment efforts. AFTRA members report that job fairs sponsored by well-known organizations such as the National Association of Black Journalists (NABJ) and NAHJ have not been well attended by employers. Small broadcast entities have completely stopped attending, but even the larger companies have curtailed their participation." 83/

This evidence already in the record reflects that discrimination and backtracking are rampant. Further, we present, below, disturbing evidence that a substantial minority of broadcasters have actually gone to the trouble to stop holding out to job seekers that they are equal opportunity employers.

82/ NASBA Comments, p. 32.

83/ AFTRA Comments, pp. 10-11. NASBA's own evidence actually corroborates AFTRA's point. It appears that many broadcasters stopped recruiting broadly in their communities and, instead, substituted Internet recruiting, which is actually little used by few broadcasters (see EEO Supporters Comments, Exhibit 2 (Summary of Content of State Broadcast Associations' Website Employment Pages)). According to NASBA, the Texas Association of Broadcasters (TAB) "estimates that the cost of recruiting declined by more than a million dollars as stations relied more heavily on the TAB's no-charge job bank and job fair program." NASBA Comments, p. 6. Thus, it appears that instead of continuing to recruit broadly in their communities whenever a job is open, Texas broadcasters decided to cut their recruitment budgets by "more than a million dollars" so they could claim to participate in a website that, apparently, many or most of them seldom if ever use.

b. Broadcasters Are Actually Going To The Trouble Of Removing "EOE" Notices From Their Job Postings

As we have seen, some trade associations are promoting the notion that the industry has made progress, is not discriminating, and is not backtracking.[84/] Perhaps these associations will withdraw these assertions upon learning that they are objectively false.

The core of NASBA's Comments is its showing that broadcasters post jobs on state association websites, and thus must be interested in equal employment opportunity.[85/] Taking NASBA's point, broadcasters posting ads on these websites should be expected to be less likely to be using exclusionary procedures than broadcasters who do not post jobs, even on the Internet.

MMTC visited the state associations' and NASBA's websites (May 23-29, 2002) and uncovered the following:

- Forty-eight sites were up, including NASBA's. Of these, thirty-nine (81%) did not state that the broadcasters posting job notices on the site (or the broadcasters in the state) were equal opportunity employers. Eight state sites, and NASBA's site, did have such notices. 86/

84/ See, e.g., NASBA Comments, p. 32 ("no evidence that the broadcast industry as a whole is a discriminator"); id., p. 12 (industry's "existing practices already reflect the intended desired behavior"); Curators Comments at 4 ("climate that caused the FCC to adopt the EEO rules...simply no longer exists.")

85/ See NASBA Comments, pp. 39-48.

86/ Alabama's site provided a referral to the EEOC, and Massachusetts' site had a very thorough list of organizations available as EEO resources. We read these liberally as representations by these state associations that the employers using their sites are equal opportunity employers.

- Nine state sites are not set up to take postings. Instead, they refer job seekers to the NASBA site. Of the other thirty-eight state sites, one had a job page being reconstructed (New Hampshire), two had job pages that could not be accessed (Illinois and Virginia), and one had a job page with listings accessible only for a fee (North Carolina, which did not participate in NASBA's Comments). Of the thirty-four state sites that had job postings available to the public, twenty-six (76%) did not have global EOE notices.

- The eight state sites with job postings that did have global EOE notices cumulatively had 168 job postings. Of these postings, 77 (46%) did not have EOE or comparable notices. These results are set out below.

State	# of Job Postings	# of Job Postings Without EOE Notice
Alabama	20	0
California	30	28
Iowa	29	0
Massachusetts	18	0
Nevada	17	14
Minnesota	28	26
Oregon	15	5
Tennessee	19	10
Washington	22	22
Total	168	77

- NASBA's site, which included postings from states that did not have their own sites, had a global EEO notice. It had 152 job postings, 34 (22%) of which did not have EOE or comparable notices.

- The twenty-six sites with job postings but without global EEO notices cumulatively had 517 job postings. Of those postings, 237 (46%) did not have EOE or comparable notices. These results are set out below.

State	# of Job Postings	# of Job Postings Without EOE Notice
Alaska	6	5
Arkansas	17	14
California	30	28
Florida	10	0
Hawaii	4	0
Indiana	29	9
Kansas	17	10
Kentucky	4	1
Michigan	60	31
Mississippi	3	0
Missouri	8	6
Montana	5	2
Nebraska	11	1
New Mexico	10	6
New York	30	12
North Dakota	6	0
Ohio	20	9
Oklahoma	26	3
Pennsylvania	10	9
South Carolina	29	29
South Dakota	10	4
Texas	119	49
Vermont	10	6
West Virginia	10	0
Wisconsin	29	1
Wyoming	4	2
Total	517	237

- Of the 320 listings on all sites with a global EOE notice (eight states and NASBA), 111 (35%) did not have EOE notices. Of the 517 listings on the 26 sites without a global EOE notice, 237 (46%) did not have EOE notices. Finally, of 837 listings on all 35 accessible sites, 348 (42%) did not have EOE notices. 87/

87/ These statistics may actually be low because they do not include broadcasters that do not recruit on the Internet at all. See p. 28 supra (noting that broadcasters who do not post jobs, even on the Internet, may be less likely to be equal opportunity employers than broadcasters who do post their openings.)

These findings demolish the protestations of NASBA and the NAB that the industry has succeeded in cleaning up its neosegregationist act. It is not "burdensome" to put the three letters "EOE" into a job ad. This simple, cost-free step -- holding oneself out as an "equal opportunity employer" -- was virtually ubiquitous in the broadcasting industry -- until now.[88/]

What possible purpose did it serve for broadcasters to consciously stop telling the public that they are equal opportunity employers? And why would twenty-one state association sites contain no global EEO notice and actually accept and post a total of 237 job ads that contained no EEO notices?

When for thirty years virtually every broadcaster posted jobs only with EOE notices, the only possible reason they are going to the trouble of deleting EOE notices is to tell the world that they are not equal opportunity employers. A substantial minority of broadcasters -- 42% -- have decided to revert to form -- the form in which they misbehaved before the Commission imposed the nondiscrimination rule in 1969.

Where does this smoking gun point? It points to the fact that we needed the EEO rule restored yesterday, and that wasn't soon enough.

88/ The undersigned counsel reviewed thousands of job notices from 1971 through 1998. Almost none did not have an EOE

tag. Among minority and female job seekers in broadcasting, EOE tags on job postings are regarded as so commonplace that the absence of one is read as code for "this job is not for you."

c. Even If There Were Only "Modest" Discrimination, Its Consequences Would Be Enormous And Unacceptable

As we have noted, industries do not discriminate, companies do.[89/] The key question, then, is whether companies discriminate enough to make regulation of the industry worthwhile. That question, in turn, leads directly to a policy judgment only the Commission can make: what kind of industry is best for the nation?

We have shown that even if only 10% of broadcasters discriminate (as opposed to about 20%, as appears to be the case in other industries), a job applicant is 50% likely to encounter discrimination by filing just seven applications, and 80% likely to encounter discrimination by filing just 21 applications.[90/] Still, let us suppose for the sake of argument that 99% of broadcasters do not discriminate and only one percent of broadcasters do.[91/]

That one percent would amount to 150 stations. To put that in perspective, let us ask this:

89/ See p. 21 supra.

90/ See EEO Supporters Comments, p. 21.

91/ Not likely, when broadcasters are tripping over themselves to take EOE notices off their job postings. See pp. 28-31 supra.

Would the IRS tolerate 150 tax cheats among 15,000 businesses?

Would a town of 15,000 people tolerate 150 drunk drivers? 150 looters? 150 rapists? 150 polluters?

A "little" discrimination pollutes the whole pond. A "little" employment discrimination should be just as unacceptable as a "little" public accommodations discrimination.

Suppose 150 out of roughly 15,000 shoe stores didn't allow African Americans to shop. Those turned away by these 150 shoe stores could each just take their money to any of the other 14,850 shoe stores; no one would go without shoes. Nonetheless, every decent American would be outraged. Should we not be even more outraged if 150 employers are denying minorities a career?

How decent do we want our broadcasting industry to be? Is it acceptable that Fortune magazine's July, 2001 survey of "America's 50 Best Companies for Minorities" lists only one media company (The New York Times Company, at number 35)? Is it acceptable that DiversityInc.com's May, 2002 survey of "Top 50 Companies for Diversity for 2001" also lists only one media company (Charter Communications, at number 50)? Is it acceptable that no company specializing primarily in broadcasting is listed among the top 50 in either survey?

All discrimination must be rooted out irrespective of the number of discriminators. The EEO rule is in a category with the tower lighting rule: a few violations carry a huge multiplier effect, damaging the competitiveness of the industry by diminishing its credibility in the public eye. In the case of broadcasting, a buzz that there is unremedied discrimination is sure to frighten

impressionable college freshmen away from broadcast majors and into other pursuits. It would be little comfort to them to learn -- if it were true -- that "only" 150 broadcasters discriminate.

Most Denny's restaurants always served all customers equally and with grace. But a few didn't. In 1999, the Annapolis Denny's didn't serve six Secret Service agents -- causing profound damage to the reputation of innocent Denny's throughout the globe. Most police officers do not plant guns or shoot unarmed men, but a few do, and that has hurt the reputation of innocent officers. Most broadcasters check daily to be sure their towers are lit, but if one broadcaster ever neglected to do this and a plane hit the tower, the broadcasting industry would not live it down for years.

If discrimination is regarded as something minor that happens to other people, it will be seen as a set of "burdensome" paperwork rules from which "relief" is needed.[92/] If it is regarded as something major that happens to oneself or one's daughters, it is something to be avoided or (if one is endowed with deep pockets, a lot of time, and bravery) perhaps remedied by make-whole EEOC-type relief. But if discrimination is regarded as a moral abomination as well as an economic drag on the industry, it has to and can only be attacked and cured by the Federal Communications Commission.[93/]

92/ See EEO Supporters Comments, pp. 62-68.

93/ A postscript: consolidation magnifies the impact of even a "little" discrimination. In many small markets there are only two viable broadcast employers. Suppose one of those employers is among the 150 (using our assumption) that discriminates. A broadcast professional unfortunate enough to be living in that market might be well advised not to invest in a house -- for if she is laid off by the nondiscriminating employer, she will have to leave town in order to continue her career.

d. If Broadcasters Really Want The End Of FCC EEO Regulation, They Can Achieve It Quickly By Cleaning Up Their Own House

The suggestion that broadcasters do not discriminate, or that the FCC "cannot prove" that they do comes awfully close to the coddling of discriminators. Broadcasting is a close-knit industry and broadcasters know each other very well. The FCC and civil rights organizations seldom receive inside knowledge of broadcaster discrimination, but broadcasters run into it all the time -- on social occasions, on the golf course, at conventions. Does anyone doubt that most broadcasters, at some point in their careers, hear a brother broadcaster remark that he prefers not to recruit or hire African Americans, Hispanics, Asian Americans, Native Americans or women?

Broadcasters professing that the "industry" does not discriminate lack moral authority, since the industry has contributed nothing to sweeping its own porch clean of discriminators. Not a single FCC EEO case -- not one -- has ever been based on evidence presented by one broadcaster against another. There seems to be a gentlemen's agreement that disclosing this particular form of lawlessness would get one banished from the broadcasters' club. Fully 100% of the cases the FCC has ever adjudicated in this area came about through the initiative of civil rights organizations, churches, discrimination victims, whistleblowers or (on rare

occasions) the FCC itself. Police officers, and even FBI personnel are beginning to blow the whistle on one another's misconduct, but broadcasters never do.

The contention that the FCC "can't prove" that broadcasters discriminate[94/] tests the limit of incredibility. To appreciate why this is so, substitute the word "burglary" for "discrimination." Suppose a person sees a burglar breaking into her neighbor's house. She knows who the burglar is, but does not tell the police. At a minimum, she is violating the Golden Rule. And she will never be heard to argue later that the laws aimed at proscribing and preventing burglary should be repealed because the police can't "prove" that the neighborhood is plagued by burglars.

If broadcasters were really as serious in their opposition to discrimination as they profess to be, they would clean up the industry's house. Instead of fighting antidiscrimination laws, they would fight discrimination. They would deploy their vast resources and skills to expose the lawless ones in their midst. After all, in every other area of communications law except EEO, broadcasters are not shy about reporting lawlessness by their fellow broadcasters. They fearlessly run to the FCC and tell on each other for antitrust violations, engineering violations, tower and aeronautical violations, indecency violations and real party in interest violations. If they began to expose one another's discrimination, the tawdry practice would come to an end -- probably in two years. Then we wouldn't need FCC EEO regulations.

2. The Rule Is Also Justified To Remedy The Consequences Of Past Discrimination, To Promote Diversity, And To Promote Competition

Rules should be justified by each purpose they serve, irrespective of whether some of those purposes would happen to

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94/ See NAB Comments, p. 70.

satisfy strict scrutiny if that standard applied.

No comments argued that the rule should not be justified on the basis of remediation.[95/]

Commenters apparently elected not to attack the diversity rationale because it was not mentioned in the Second NPRM. NASBA urged that by not relying on the diversity rationale, the Commission can no longer claim reliance on NAACP v. FPC, 425 U.S. 662, 670 n. 7 (l976) as support for having the EEO rule.[96/] Actually, the Commission should continue to rely on diversity for the simple reason that diversity remains a serious issue,[97/] and

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95/ See EEO Supporters Comments, pp. 22-24 (demonstrating that the rule is remedial and asking the Commission to acknowledge this.)

96/ See NASBA Comments, p. 29.

97/ Diversity in broadcasting continues to be a serious problem. See Children Now, "Fall Colors 200l-02: Prime Time Diversity Report (2002)." This comprehensive study of the Fall 200l-02 season found that "a youth watching prime time on the six major television networks would most likely see," inter alia:

- family structures being more obvious for White youth than for youth of color
- African American families nearly exclusively serving as a the focus of situation comedies
- a world still primarily populated by able-bodied, single, heterosexual, White males under 45
- a world in which the overall number of Latino faces increases from last year, though the majority were found in secondary and tertiary roles and nearly

half of these characters held low status positions and occupations

- a world with few Native Americans and a world where Native American women do not exist
- a continuing stark contrast between occupations held by men and women.

the EEO rule does in fact race-neutrally promote diversity.[98/]

One commenter, perhaps unintentionally, seemed to suggest that antidiscrimination rules are not needed to promote competition. This commenter suggests that there is "*no shortage* of qualified employees in the broadcast industry" (emphasis in original).[99/] However, there was also no shortage of qualified employees in 1960, when there were no opportunities for minorities in broadcasting. No firm or industry competes effectively when those on the assembly line, or at the mic, in master control or on the sales team are minimally "qualified." Instead, a competitive firm and a competitive industry always strive to "find the best-qualified candidate. And when broadcasters and cable entities have a more talented workforce, we all reap the benefits."[100/]

98/ Official notice is respectfully sought of the 6th Circuit's decision in Grutter v. Bollinger, 2002 U.S. App. LEXIS 9125 (6th Cir., May 14, 2002) ("Grutter"). In Grutter, the Court held that a law school has a compelling interest in maintaining a diverse student body. The University of Michigan Law School did not use quotas or set-asides, but did pursue a "critical mass" of minorities and it expressly considered race. The Court regarded this approach as roughly comparable to the "Harvard Plan" endorsed in Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ("Bakke"). The Court (voting 5-4) recognized Justice Powell's opinion in Bakke as good law. Broadcasting (especially public broadcasting and children's television) performs electronically many of the cultural, educative and social interactive functions of the schools. Thus, Grutter should give the Commission some comfort that diversity is alive as a matter of constitutional law.

99/ LTVG Comments, p. 25.

100/ Second NPRM, 16 FCC Rcd at 22875 (Separate Statement of Commissioner Kevin Martin).

C. The Means Chosen For Preventing Discrimination Are Constitutional And Substantively Rational

1. No One Would Be Disadvantaged By The Commission's Recruitment Procedures

The Commission's race-neutral broad recruitment procedures disadvantage no one. Opponents of the proposed rule have failed even to provide a hypothetical example of how anything the Commission has proposed deprives them, or any potential job candidate in privity with them, of anything to which they would otherwise be entitled. As LCCR explains:

> even if strict scrutiny applied, the rules are exceptionally narrowly tailored. Far from the D.C. Circuit's concern that broadcasters feel pressured to discriminate on the basis of race, the outreach provisions in the revised rules are wholly neutral with respect to race. Likewise, the data collection and reporting requirements, as the Commission has repeatedly emphasized, are not tied to broadcasters' equal employment opportunity obligations and will not be used by the Commission for enforcement. Instead, applying the typical concerns of the "narrow tailoring" inquiry, broadcasters are given a flexible choice of possible outreach efforts to undertake, are required no more than once a year to make reports on their progress, and are not asked to *limit* or *abandon* any existing methods of recruitment or hiring. The rules thus have no 'non-beneficiaries' who stand to lose some benefit to which they are entitled. By requiring broadcasters to take steps beyond what they currently do to recruit and publicize job openings to applicants not currently "in the loop," the rules are targeted at achieving no more than precisely the compelling interest they serve: deterring and preventing impermissible discrimination by broadening the pool of possible recruits (emphasis in original). 101/

We amplify below on this analysis with respect to each of the three prongs of the outreach provisions of the proposed rule.

a. Prong 1: Broad Recruitment

Broad recruitment is so easy to perform that it should be beyond reasonable debate. As Radio One points out, successful

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101/ LCCR Comments, p. 7.

recruitment requires only "a general commitment to the ideal that by participating in broader recruitment outreach efforts, it will lead to a larger, more diversified applicant pool, which in turn leads to a more diverse workforce as a whole."[102/] And as the NAB acknowledges, broad recruitment makes "good business sense," although NAB is a tad naive in assuming that if something makes sense, broadcasters will all do it.[103/]

Some objections to broad recruitment appear to have been inadvertently republished from the Lutheran Church or MD/DC/DE Broadcasters playbooks, since they self-evidently are inapplicable here. For example, NASBA suggests that "any attempt to establish lines of demarcation must involve the government setting standards to determine how many employees with a particular racial, ethnic or cultural characteristic will create a level of *acceptable* heterogeneity so employers can avoid running afoul of rules and policies."[104/] This objection is puzzling since there is no attempt in the proposed rule to "establish lines of demarcation[.]" The appellant in Lutheran Church identified such a line; none of the commenters in this proceeding do.

A similar objection, by NASBA, posits that there will be allegations that certain groups in the community were not reached

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102/ Radio One Comments, p. 4.

l03/ See NAB Comments, p. 68 (suggesting that a rule requiring broad recruitment is unnecessary because conducting broad outreach "simply makes good business sense.") Of course broad outreach and equal employment opportunity also made good business sense in l760, in l860, and in l960, but industry didn't provide these things because other, nonpecuniary imperatives overcame the good judgment of almost all White American businesspeople.

l04/ NASBA Comments, p. 33.

by broad recruitment.[105/] However, if an organization raises such an objection, the licensee has a perfect and complete answer: the objector was and is free under Prong 2 to join the recruitment list, and the objector can encourage other such organizations to do so as well.

NASBA also objects to the use of broad recruitment as an antidote for excessive old-boy recruitment. Specifically, NASBA suggests that "[i]t is surely strange...for the FCC to contend that regulations *prohibiting* word-of-mouth recruitment are necessary to 'deter discrimination,' when anti-discrimination law *permits* such word-of-mouth recruitment" (emphasis in original).[106/] However, the rule would not prohibit word of mouth recruitment at all. The rule would only require that it not be conducted in an inherently discriminatory manner. To achieve that, broadcasters should use other means of recruitment that supplement, not substitute for, word of mouth recruitment.[107/]

105/ See NASBA Comments, p. 52.

106/ Id. p. 34.

107/ One of the NAB's proposed means of broad recruitment is on-air announcements, which the NAB regards "as an option for fulfilling the recruitment obligation" because "by definition, a broadcast station's 'community' consists of its audience." NAB Comments, p. 39. For some stations, on-air recruitment may be effective, but as the NAB recently said in another context, almost every station reaches different demographics through format specialization and narrowcasting. See NAB Comments in MM Docket No. 01-317 (Local Radio Ownership Rules)

(filed March 27, 2002), pp. l5-l7. See also Lutheran Church, l4l F.3d at 355-56 (a "goal of making a single station all things to all people makes no sense" and "clashes with the reality of the radio market.") Broad recruiting should aim to reach the entire community, but almost no broadcaster programs to reach the entire community.

To be sure, quite often word of mouth recruitment is perfectly reasonable. Recognizing this, the NAB contends that "[g]iven that so many minorities and women are now employed in the broadcasting industry, it follows that minorities and women are now quite likely to hear about opportunities, even if is by 'word-of-mouth.'"[108/] At many stations the NAB's assertion is true. But in other stations and for many types of jobs within a station, it is still a dream. For example, in Texas, in l997 (the last year with FCC aggregate data), there were 308 broadcast reporting units, 48 of which reported l00% racial homogeneity in the top four job categories, i.e., they reported either no minority or no nonminority employees. That does not mean that these employers discriminated. It does not mean they should have gone out and hired on the basis of race rather than merit. It does not even mean that it was wrong for them to recruit by word of mouth. But it does mean that if these employers recruited by word of mouth, they should have supplemented their word of mouth recruitment with additional outreach methods in order to avoid discrimination.

Other objections relate to the need to recruit broadly all the time. In the same pleading in which it acknowledges that broad recruitment makes "good business sense,"[109/] the NAB contends that broad recruitment "makes little sense" in times of low demand for

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108/ NAB Comments, p. 12.

109/ See NAB Comments, p. 68.

new employees.[110/] This objection is poorly taken for several reasons. First, demand for employees may be high at some types of stations and in some markets but not others. Second, demand for employees can change dramatically in the short term (as it did after 9/11). Third, demand for employees in broadcasting is often seasonal, with the greatest demand in the late summer in anticipation of the Christmas shopping season. Fourth, those not hired for a job today may be just right for jobs that become available later. Thus, the Commission should expect broad recruitment irrespective of impermanent and unpredictable labor market conditions.

Another of the NAB's practical objections was that broad recruitment may be inefficient because some organizations are not

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110/ See NAB Comments, pp. 13-14 ("it makes little sense for the Commission to prescribe specific recruitment measures without regard to the supply and demand of jobs during various periods of time.")

responsive to job announcements.[111/] Broadcasters are assumed to know their communities, so if a source is nonresponsive, broadcasters should contact the source and ask what can be done to generate more referrals. If the source is unable to provide referrals, the broadcaster can get another source. This objection is puzzling, since the marginal cost of adding another organization to an e-mail list is zero.

The only serious substantive objection to the operation of Prong l is a disagreement about the definition of the "community" to be reached.[112/] At bottom, this disagreement has minor real-world consequences, since recruitment sources can be notified

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111/ NAB Comments, p. 15. In a related objection, the NAB states that "[a] broadcaster of course has no control over who applies for job openings, yet the Commission's proposal requires that a station maintain and submit documentation of its recruiting efforts, for purposes of the Commission's assessment of the station's EEO recruitment efforts." Id., p. 38. While it is a truism that a broadcaster "does not control" who applies, the broadcaster's choice of the means of recruitment powerfully influences who might apply. If a source did not produce applicants, the broadcaster is always free to go out and find better sources. Finally, the NAB suggests that broad outreach "may not be adequate protection from a third-party's claim that such actions were successful because the station employs a low proportion of minorities." Id., p. 39. The difficulty with this argument is that the Commission has said in Shermanesque tones repeatedly that it will not consider such arguments. See, e.g., First R&O, 15 FCC Rcd at 2418 ¶225 ("[w]e...state in the clearest possible terms that we will not use the [Form 395-B] data to assess broadcasters' or cable entities' compliance with our EEO rules" (emphasis in original)); see also Second NPRM, 16 FCC Rcd at 22858 ¶50 (reaffirming this). How many times must the Commission say this before the NAB stops saying the opposite?

ll2/ NASBA contends that the requirement that broadcasters recruit throughout their "entire communities" is "unconstitutionally vague." NASBA Comments, p. 5l. This requirement does not mention or involve race, so it is difficult to understand why it would implicate the constitution.

by e-mail.[113/] The "community" for EEO purposes should be the same as that used by all other civil rights enforcement agencies -- the geographic area from which people commute to work. The Commission has always interpreted that to be the MSA or, if the station is not in an MSA, the county in which the station is located.[114/] Nothing prevents a regulatee from recruiting beyond its community, and regulatees do this anyway for specialized employment. Nonetheless, no one is harmed by a requirement that a standard recruitment list reach qualified people able to commute to work.[115/]

113/ The NAB suggests that "requiring all stations to publicize their job vacancies throughout their MSA, regardless of size or location, is far too constraining." NAB Comments, p. 43. Nonetheless, it is where the workers live and can reach in a commute, not what stations they tune in, that should determine who gets notice of a job opening. One does not have to listen to a station to work there; nor does one have to live within the service area to be a good employee.

114/ See Second NPRM, 16 FCC Rcd at 22850 ¶23 (defining "community.") This definition has never been the subject of significant controversy or difficulty as applied.

115/ The only point in NCTA's Comments with which we respectfully take issue is its suggestion that a cable service should only have to recruit "where [it] provides service to customers.... [c]able operators should have the option of defining 'community' contiguously with these precise limits." NCTA Comments at 6. There is no rational basis for allowing an employer to go to the trouble of tailoring its e-mail list so as to exclude organizations in nearby communities. A job laying wire or selling advertising is not performed better simply because the employee lives close to the headend. NCTA's proposed definition of "community" would allow a cable company serving D.C. to stop recruiting qualified suburban workers, and would allow a cable company serving Montgomery County to stop recruiting qualified D.C. workers. Cf. Stone

v. FCC, 466 F.2d 316, 332 (D.C. Cir. 1972) ("Stone") (in evaluating an allegation of intentional discrimination by a television station, the community from which potential employees are drawn is the Washington metropolitan area, not the District of Columbia.) Such a definition could be used by a system serving a racially segregated suburb to exclude those living on the other side of the geographic racial boundary. See, e.g., [Cicero case]. Given NCTA's longstanding support for equal opportunity, we are confident that NCTA did not intend this result.

The Commission has always expected broad recruitment for virtually all vacancies. No commenter has articulated a sound reason not to require it now, since it is achieved with the touch of an e-mail key.

The Commission has proposed to forgive all-vacancy recruitment in the event of "exigent circumstances."[116/] The NAB suggests that "it would be helpful if the Commission suggested additional, specific examples when this exception would apply."[117] This point is well taken, and we have offered four such examples in our Comments.[118/]

Finally, we note that one commenter is a business created specifically to provide employers with a far broader degree of outreach than an employer could achieve on its own.[119/] This commenter, Broadcast Compliance Services ("BCS") asks the Commission to authorize regulatees to outsource and expand their recruitment while still maintaining responsibility for employee interviewing and hiring, for outreach beyond recruitment (i.e., Prong 3) and for the overall integrity of their EEO programs. Under this protocol, companies like BCS would operate in the EEO arena much as contract engineers operate in the technical arena. This is a commendable and very creative idea. It is quite

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116/ Second NPRM, 16 FCC Rcd at 22851 ¶25.

117 NAB Comments, pp. 46-47.

ll8/ See EEO Supporters Comments, pp. 87-96.

ll9/ See BCS Comments, pp. 4-7. BCS is set up to do direct searches, as well as reverse searches which "plac[e] applicants' resumes in the hands of station personnel wherever the applicant seeks employment[.]" Id., p. 8.

different from recruitment scams that occasionally popped up a generation ago.[120/] Innovative and professional services such as this one are consistent with the Commission's objectives and they deserve the Commission's encouragement.

b. Prong 2: Opt-In Job Notices

It is difficult to think of a more innocuous idea than simply including in an e-mail list those organizations interested in helping broadcasters reach the entire community. Broadcasters often complain that local groups sometimes do not or cannot help them find good candidates, so broadcasters should be happy when organizations are encouraged to come forward to volunteer.

Thus, it was surprising that a commenter would attack Prong 2 as improperly "authoriz[ing] essentially every entity that exists to require nearly every broadcaster in the country to supply it with notice of every broadcast job opening that occurs."[121/] This commenter speculates that a business might use Prong 2 "to serve purely private commercial ends."[122/]

120/ On a few occasions about 20 years ago, 1980s, brigands exploited businesses' unfamiliarity with the civil rights laws by publishing phony books of tombstone advertisements. The ads in these books were organized in no logical way and they did not offer particular jobs. The books were distributed to almost no one. In one instance, the promoter of such a book played on the name of a well known civil rights icon who would have turned in his grave if he had known of it. Yet companies who bought ads in these books sometimes believed in good faith that they had recruited broadly. That is not what BCS proposes at all. BCS' operation is aimed at

fostering compliance, widening recruitment and notice of jobs and promoting opportunity.

l2l/ LTVG Comments, p. 2l. See also Various Radio Licensees Comments, p. 6.

l22/ LTVG Comments, p. 22. Broadcasters themselves would never do anything that "serves purely private commercial ends." :)

Further, this commenter fears that "job placement consultants" or "even individual job seekers" could ask broadcasters for job notices.[123] These fears are without foundation. A wide range of information about American businesses is freely available in the public domain (e.g., all broadcast engineering filed with the FCC) but no one has been harmed by its availability to the general public.

NASBA suggests allowing broadcasters not to refer half of their jobs to Prong 2 recruitment sources.[124] But NASBA asks too much of the Commission to select a number that has no "reasoned explanation" to support it.[125] Allowing half of the jobs to be filled by word of mouth would overrule the line of cases holding that excessive word of mouth recruitment from a homogeneous control group can be inherently discriminatory.[126] That would place the Commission on a collision course with EEO jurisprudence in other

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123/ Id. This commenter also postulates that Prong 2 is an "unconstitutional delegation of the FCC's law-making [sic] powers." Id. The commenter does not cite one case in support of this non-self-evident proposition, or indicate which provision of the constitution is violated by a "law" that discourages discrimination. The best that can be said is that this was not the most creative objection to Prong 2. That honor belongs to the idea that Prong 2 could be used by "hate groups." (How?) See id., n. 31.

124/ NASBA Comments, p. 54.

125/ Sinclair Broadcast Group, Inc., 284 F.3d 148, 162 (D.C. Cir. 2002) ("Sinclair").

l26/ See, inter alia, the cases cited in EEO Supporters Comments, pp. l5-l6 n. 38.

forums,[127] for no discernible purpose besides knee-jerk "deregulation" for its own sake.[128]

Finally, AFTRA proposes that "organizations requesting notification of job vacancies should be required to make their request only once during a licensee's license period, and thereafter automatically be sent notices of vacancies."[129] We agree. Broadcasters are not required to produce more than one EEO program during a license term. The public should have no greater obligation.

c. Prong 3: Outreach And Career Building

The Prong 3 outreach requirements reflect government at its best: recognizing that building a competitive and inclusive broadcast workforce requires advance planning, education and initiative.[130]

127/ See, inter alia, the cases cited at p. 24 n. 73 supra.

128/ NASBA's proposal is actually more "burdensome" than the Commission's proposal. Hitting an e-mail key costs nothing, but keeping records does carry at least some minor expense. Which is more expensive: a broadcaster telling its staff to automatically send job notices to the Prong 2 e-mail list, or a broadcaster telling its staff to keep records to be sure that the e-mail key was hit more than 50% of the time?

129/ AFTRA Comments, p. 5.

130/ Second NPRM, 16 FCC Rcd at 22852 ¶28 (Prong 3 is aimed at encouraging "outreach to persons who may not yet be aware of the opportunities available in broadcasting...or have not yet acquired the experience needed to compete for current vacancies.")

The Commission has already found the Prong 3 requirements not to be "burdensome."[131/] Further, they are constitutionally noncontroversial.[132/] As LCCR notes, "[n]one of the requirements involve efforts targeted at (or even necessarily including) particular ethnic groups or women."[133/] Furthermore, these requirements would not "burden" well run, successful companies.[134/]

Prong 3 can be improved by adding additional menu options,[135/] by insisting on senior management's involvement,[136/] and perhaps by

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131/ See Recon, 15 FCC Rcd at 22552 ¶9 (2000) (rejecting NAB's "generalized claims of burden that it has failed to support with any specific evidence.") NPR's suggestion that Prong 3 would impose "undue burdens on many governmental, institutional, and small broadcast licensees" was not supported by any cost analysis and is far too vague to merit any consideration. See NPR Comments, p. 4.

132/ Without citing a single case or providing a single example, one commenter states that "all thirteen" Prong 3 requirements "are almost certainly invalid under the First and Fifth Amendments to the Constitution." LTVG Comments, p. 27. But see MD/DC/DE Broadcasters, 236 F.3d at 19 (holding that Option A, which is essentially the same as Prong 3, raised no constitutional concerns.)

133/ LCCR Comments, p. 12.

134/ See, e.g., Radio One Comments, p. 3 (noting that the company "has regularly held job fairs in each of the markets in which it operates, as well as instituted mentor programs for high school and college students, and has sent on-air talent to various fundraising events and 'career days' at local schools which not only target the minority community, but the local community in general.")

135/ See EEO Supporters Comments, pp. 102-119.

l36/ AFTRA's "members have consistently reported that when broadcast employers participate in such events (however infrequently), such employers are generally represented by lower level managers with no real authority to make hiring decisions." AFTRA Comments, p. l4. Thus, AFTRA recommends that "the Commission should mandate that where a licensee participates in any way, and in any time, in a job fair, that this participation be undertaken by a company representative with substantial authority for hiring decisions." Id., p. l5.

adding one mandatory requirement.[137/]

Some Prong 3 options may involve more "work" than others,[138/] but that is not a valid objection to Prong 3. The point of having a menu is that some dishes are more appetizing to one diner than

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137/ AFTRA also suggests that "licensees should conduct regular, internal training programs on discrimination issues for existing staff." AFTRA Comments, pp. 5 and 17. We offered a similar suggestion as an additional Prong 3 option. See EEO Supporters Comments, p. 117. But AFTRA's idea is much better. The misinformation found in some of the industry comments amply demonstrates that broadcasters are in dire need of accurate information about EEO.

138/ See NAB Comments, p. 51 (complaining that "if a station chooses the option of participating in job fairs as one way to meet its outreach requirements, the Commission's rules would require the station to attend four job fairs in a two-year period to fulfill only one of its required outreach options"); id., p. 52 ("all outreach initiatives are weighed equally, even though some require much more effort or expense than others.") Actually, ranking the options by their "effort or expense" or (more to the point) by their effectiveness may depend on local conditions or on the size and type of broadcast company. In New York City, for example, there are dozens of job fairs every year, while in the Buffalo area there are four colleges and universities with broadcast programs offering student internships for academic credit. The Commission's menu struck the right balance by letting each broadcaster decide which approach suits it best.

another. No one avoids a restaurant simply because she doesn't choose to eat everything on the menu.[139/]

One commenter fears that noncompliance with Prong 3 will be judged based on events beyond the control of the broadcaster.[140/] That is not what the Commission has proposed. The focus of the Commission's proposal is on whether the initiative (e.g., a job fair) occurred and whether the broadcaster participated -- not whether the job fair was a success.[141/]

139/ It is unfortunate that the NAB's only concern with Prong 3 is the relative "effort or expense" of some of the menu choices. Id., p. 52. If Prong 3 is adopted, we hope industry leaders will encourage their members to select their Prong 3 options not with an eye to the cheapest, laziest way to comply, but with an eye to which options will be the most effective in bringing new, talented people into the industry. As the Commission emphasized when it adopted its first EEO rule:

> It is important to emphasize in connection with the requirements of the general rule, and the equal opportunity programs proposed, that they do not cover certain areas of employment practiced which we described as most appropriate for an appeal to conscience in our earlier opinion....broadcasters might consider the adoption of special training programs for qualifiable minority group members, cooperative action with other organizations to improve employment opportunities and community conditions that affect employability, and other measures in addition to the employment practices suggested in the proposed rules. These voluntary measures may well be the chief hope of achieving equal employment opportunity at the earlierst possible time, and the decision to take such action rests with the individual broadcaster.

1969 Nondiscrimination R&O, 18 FCC2d at 245.

l40/ See NAB Comments, p. 36 (suggesting that "[t]he Minority Media and Telecommunications Council or similar group...may argue that [a] job fair should not count as a completed EEO outreach initiative because it a failed to expand the station's pool of potential minority or female job candidates.") MMTC does not litigate adjudicative EEO cases, but if it did, it would not make this obviously flawed argument.

l41/ See Second NPRM, l6 FCC Rcd at 22854 ¶36 (reporting focuses only on what steps were taken).

2. No One Would Be Disadvantaged If The Commission Gathers Routine Research And Enforcement Information

In any meaningful regulatory system, universal and transparent recordkeeping is the only evenhanded way to ensure accountability and protect the public from bad actors. Responsible drivers accept emissions testing as a minor inconvenience needed to prevent pollution; responsible slaughterhouses accept USDA inspections as a minor inconvenience to prevent disease. And for thirty years, responsible broadcasters accepted recordkeeping as a minor inconvenience to prevent discrimination.

Broadcasters are usually the nation's leading advocates of public disclosure and transparency in government and business. In this proceeding, though, some broadcasters have lost their journalistic voice. They have also resorted to thinly-veiled smears of the civil rights organizations which have carried on the thankless job of calling the Commission's attention to violations of the EEO rule[142/] -- a task made necessary because broadcasters themselves never report the discriminatory behavior of their

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142/ Three of the EEO Supporters, the NAACP, LULAC and the Office of Communication of the United Church of Christ, have brought the majority of the cases in this area. They are apparently among the unnamed targets of NASBA's allegation that the rule would allow "third parties to use the rules for private ends by accusing broadcasters of misrepresentation and 'gaming the regulations' by filing or threatening to file

abusive complaints, petitions and oppositions. Such a regulatory scheme ends up transforming good intentions into a risk laden and burdensome process that creates unwarranted proceedings, disproportionate sanctions and a 'greenmail' arcade. The Commission's law library is filled such cases, particularly in the area of EEO." NASBA Comments, p. 6; see also Curators Comments, p. 5 (to the same effect).

(n. l42 continued on p. 54)

competitors.[143/] The Commission should reaffirm that voluntary public participation roots out lawbreakers and keeps the industry honest.[144/]

For public participation to have any value, the public must have enough knowledge to make an informed judgment concerning which licensees are recruiting broadly and race-neutrally and which licensees are not. As the D.C. Circuit declared in 1972 in a case in which a licensee unreasonably withheld ascertainment evidence:

> acquiescence in a pattern of such conduct might discourage representatives of the public from submitting Petitions to Deny, since it would convey the message that the renewal process is a meaningless exercise, or a never-ending battle for which they have insufficient resources....[even an unsuccessful petition to deny can be] a successful public inerervention which this court has consistently welcomed as serving the public interest. 145/

142/ (continued from p. 53)

Understandably, no party actually cites a "greenmail" case because since there haven't been any in years. In 1990, the Commission banned "greenmail." The underlying regulations are 47 C.F.R. §73.3588 and 73.3589 (1990). These regulations has been 100% effective in preventing those bringing EEO allegations from securing any commercial or even noncommercial advantage. For their part, the civil rights organizations have conducted themselves without blemish. For helping the Commission identify lawbreakers, they are often branded as troublemakers by the local broadcasters they rely on for news coverage. Nonetheless, they often are able to bring about improvements in broadcasting that serve the public interest. See, e.g., Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519, 527-28 (D.C. Cir. 1972) (remanding settlement proposal to Commission).

143/ See pp. 35-35 supra.

l44/ From l994 to l997, of the 25l EEO cases decided by the Commission in response to petitions to deny, the Commission determined in l55 cases that the broadcaster was violating the rule. See MMTC, "FCC EEO Enforcement, l994-l997 (l998)", discussed in the l999 EEO Supporters Comments, pp. 205-206. In few other areas of FCC regulation has public intervention been so helpful in rooting out law violators.

l45/ Stone, 466 F.2d at 332 (on petition for rehearing).

The reporting regulations attempt to ensure that members of the public will neither abandon the fray for lack of information, nor file scattershot allegations in the hope of inadvertently uncovering lawbreakers. The regulations do not ask for the measurement or documentation of anything the government or the public does not need. Nothing in the regulations requires paperwork for its own sake. Nor, contrary to NASBA's mischaracterization, does the proposed rule require broadcasters to certify to a legal conclusion.[146/]

If a rule is valid, and enforcement of the rule depends on public participation, it is reasonable to expect regulatees to report the information needed to verify compliance. Broadcasters understand that; they have never interposed any serious objection to far more intrusive recordkeeping requirements, such as those based on site visits by government agents.[147/] A rule requiring broadcasters to show that they have avoided discrimination is every bit as important as a rule requiring broadcasters to show that they have avoided harmful interference.[148/]

146/ See NASBA Comments, p. 6 (suggesting that Commission might be requiring broadcasters to "certify" compliance with some vague legal standard.)

147/ Every broadcaster is subject to extensive engineering rules that require the maintenance of logs. The FCC can inspect these logs if it receives complaints that the broadcaster violated the interference rules, or for no reason at all. See 47 C.F.R. §73.1225 (Station Inspections by FCC)

and 47 C.F.R. §73.l226 (Availability to FCC of station logs and records).

l48/ That is not a value judgment: it is what Congress insisted upon in the l996 Act when it added race and gender nondiscrimination to the goals in 47 U.S.C. §l5l.

Good EEO records have been invaluable in identifying discriminators,[149] and, unfortunately, poor EEO records have been just as invaluable to law violators in avoiding accountability for EEO rule violations.[150] Thus, the Commission has suggested that it could perform random audits. To its credit, the NAB does not object to them.[151] NASBA objects to them, but its objection overlooks the fact that such audits will be random.[152]

149/ Thirteen of the fourteen EEO cases that went to hearing since l97l involved stations whose own records showed that they may have discriminated in employment. A discussion of these cases is provided in the Reply Comments of EEO Supporters in MM Docket No. 98-204, filed April l5, l999 ("l999 EEO Supporters Reply Comments"), pp. 28-29.

150/ See, e.g., CRB of Florida, Inc., 6 FCC Rcd 2303, 2304 ¶¶10-11 (l99l) (licensee maintained no records, but its license was renewed with a $7,500 forfeiture); Sarasota Renewals, 5 FCC Rcd 5683, 5685-86 ¶¶22-25 (l990) (licensee did not know, inter alia, the referral sources of most applicants, but its license was renewed with only a $2,000 forfeiture).

151/ See NAB Comments, p. 34.

152/ See NASBA Comments at 50 ("[t]he Government can also openly or surrepititiously use data in Annual Employment Reports as a basis to *audit* stations' performance" thereby putting "pressure...on stations to hire based on race and gender to avoid audits" (emphasis in original). The Commission has already stated that if audits occur, the stations audited will be chosen at rrandom. Second NPRM, l6 FCC Rcd at 22856 ¶43. We note that in the First R&O, the Commission proposed random audits but added that it "may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO rule." First R&O, l5 FCC Rcd at 2388 ¶l45. The Second NPRM does not contain that additional language. Thus, the only "audits" the Commission intends to perform are random audits of recruitment and outreach. The only other type of investigation it will perform is the kind of investigation the Court expects it to

conduct when faced with a prima facie case of intentional discrimination. See Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 628-30 (D.C. Cir. 1978). If the Commission adopts a rule saying that audits will be done only at random, that must be presumed to be what the agency will do. Agencies are expected and assumed to observe their own rules, see, e.g., Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976).

The NAB does not want EEO compliance to be reviewed in connection with license renewals.[153/] Its objection is presented in the wrong forum. Congress has required the Commission to ensure at license renewal time that broadcasters are obeying the law.[154/] Further, in light of the nondiscrimination command of Section l5l of the Act,[155/] it would be repugnant for the Commission to declare that at license renewal time it will ensure that broadcasters are observing every rule -- including lowest unit charge, tower lighting, overmodulation, hours of operation -- except the rule requiring nondiscrimination and steps to prevent discrimination.

a. Recruitment Data

Two objections to the Commission's recruitment recordkeeping proposal border on being disingenuous, because they speak to obligations not contained in the proposal.

One objector suggests that tracking recruitment sources "looks at outcomes" and implies a "diversity quotient" that would

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153/ NAB Comments, p. 36 (urging the Commission "to make a clear finding that review of a station's EEO outreach will not be conducted in direct conjunction with review of a license renewal application.")

154/ 47 U.S.C. §309(k)(2) (Commission may deny, or grant only conditionally or for a short term, the renewal application of a licensee that "fails to meet the requirements of this subjection", including that "there have been no serious violations by the licensee of this Act or the rules

and regulations of the Commission" and that "there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, could constitute a pattern of abuse", 47 U.S.C. §§309(k)(l)(B) and (C).

l55/ 47 U.S.C. §l5l (l996) (creating the FCC, inter alia, "so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (emphasis added).

"pressure licensees to hire people because of their race, ethnicity or culture, when diversity is not optimized."[156/] However, the proposed rule, on its face, neither requires nor "implies" any such thing. A licensee could gain no advantage by hiring on the basis of race, since hiring statistics will not be used to evaluate the appropriateness of recruitment methods.[157/]

Another objector suggests that a requirement that a broadcaster "evaluate whether its efforts are achieving broad outreach can mean only one thing: the FCC wants the station to track how many minorities and women are actually responding to these outreach efforts so that the public and the FCC can measure the station's interviewing and hiring of various groups and, specifically, minorities and women."[158/] No such "tracking" is required or even suggested by the rule. The evaluation of whether outreach was broad is geared to the methods used, not the race of those who respond.

Indeed, the suggestion that evaluation of broad recruitment necessarily involves race does not give broadcasters credit for being multidimensional in thinking about their communities. There are many very obvious nonracial ways to evaluate whether outreach is broad. For example, did several sources produce applicants, or are they all coming from word of mouth or from one institution? Is the licensee relying mostly on a school that charges high tuition

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156/ Curators Comments, p. 8.

157/ See, inter alia, First R&O, 15 FCC Rcd at 2418 ¶225-25; see also Second NPRM, 16 FCC Rcd at 22858 ¶50.

158/ NASBA Comments, pp. 41-42.

and awards few scholarships? If the licensee relies on a trade group's website, does the site allow for resume postings, and can only members post resumes? Are applicants responding to the postings for a variety of job types? Are the recruitment sources geographically dispersed? These questions have nothing to do with race, but they do allow a prudent licensee to evaluate its recruitment to ensure that it is reaching the entire community.[159/]

Finally, Various Radio Licensees suggest that requiring broadcasters to post EEO data on their websites is "probably unconstitutional under the First Amendment."[160/] However, the Commission's proposal is no more intrusive than requiring food or pharmaceutical or cigarette manufacturers to put nutritional or health information on their packaging. The First Amendment is not violated by requiring a business to publish consumer information, such as data establishing how it is obeying the law.[161/]

159/ Since some broadcasters apparently do not understand this, it might be a good idea to point it out in the order concluding this proceeding.

160/ Various Radio Licensees Comments, p. 5.

161/ The test governing whether the First Amendment is violated when the government requires commercial speech that the speaker would not otherwise impart is drawn from Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y., 447 U.S. 557 (1980). In particular, the asserted governmental interest must be substantial, the regulation must directly advance the governmental interest, and the regulation must not be more extensive than is necessary to serve that interest.

Id. at 556. The FCC's website posting proposal would easily pass this test. The FCC's interest in preventing discrimination is substantial, and the requirment to post compliance information on a website is no great imposition.

b. Data On EEO Complaints

If a stranger to this litigation were asked "what is the single piece of information most likely to lead to probative evidence of intentional discrimination" the answer would have to be "the name and address of someone who says she has firsthand evidence that the broadcaster discriminated." This is as close to a no-brainer as it gets in communications regulation.[162/] Unfortunately, that did not prevent an objection to the 28-year requirement that broadcasters disclose the existence of discrimination complaints.[163/]

This is an issue where the "burdensomeness" argument has no legs at all. A discrimination complaint is an emotional event. No broadcaster would forget such an event even if all of its records had been sent to the shredder. Further, no company capable of operating a broadcast station is so unsophisticated that it is not capable of keeping track of these complaints, or having its civil rights "defense" counsel do so.

162/ One of the commenters that opposes almost everything else in this proceeding graciously acknowledged that it "thinks the FCC is authorized by the Communications Act to consider violations of existing employment discrimination laws in making its broadcast licensing decisions." LTVG Comments, p. 2 n. 3.

163/ See Curators Comments, pp. 5-7.

To be sure, the FCC certainly could obtain this information on its own. It could, for example, undertake the expensive task of inquiring repeatedly of the EEOC and the dozens of state and local Section 706 agencies whether any complaints were lodged by broadcasters. Since the FCC can ask for this information from other agencies, there is no logical reason why the FCC cannot save the taxpayers some money by asking the licensees themselves.

There is always one reason companies fear transparency of discrimination allegations: they want to avoid accountability.[164/] That is never a reason to forego or abstain from regulation.[165/]

164/ The Commission also reviews and requires reports regarding fraudulent statements to government agencies, certain criminal convictions, and violations of broadcast related anti-competitive and antitrust statutes. See Character Qualifications in Broadcast Licensing (R&O), 102 FCC2d 1179, 1195 (1986) (subsequent history omitted). Interestingly, no one objects to telling the FCC about these kinds of allegations. The only objections are to disclosure of EEO allegations.

165/ NASBA seeks a ruling that only "'pending' complaints of which the licensee has notice or complaints resolved adversely to the station during the license term" need be disclosed, as opposed to complaints "that were resolved in their favor or complaints that were dismissed without any action." NASBA Comments, p. 56. We would imagine that if a complaint had been earlier reported as pending, and it is later resolved in the licensee's favor, the licensee would want the Commission and the public to know that fact. Nonetheless, if a complaint is resolved in favor of the licensee on the merits (rather than because of a procedural point such as jurisdictional size limits or timeliness), a report on that complaint generally would not yield probative evidence of discrimination. Thus, NASBA is correct that

reporting such a complaint would serve no regulatory purpose. On the other hand, a complaint dismissed only because it was time-barred (or had some other nonsubstantive flaw, such as the employer having fewer than fifteen employees) could very well yield evidence of discrimination, so it should be reported. In this regard it is worth noting that a renewal term is more than seven years longer than Title VII's statute of limitations; consequently, a good deal of evidence the EEOC cannot consider is evidence the FCC can and should consider.

c. Annual Employment Reports

Our Comments proposed a compromise. Its key points were: (1) sever the Form 395 issue from this proceeding and put it into its own docket, thereby avoiding even the appearance that Form 395 is related to evaluation of the recruitment regulations;[166/] and (2) withhold Form 395 from the public for three years, except in the rare instance where a complainant, using other evidence, establishes a prima facie case of discrimination.[167/]

Our proposed three-year hold was based on the fortuitous coincidence that the shelf life of Form 395 data for labor force research is roughly seven years,[168/] but the shelf life of this data for (prohibited) EEO program review of individual stations would be no more than three years. Thus, after three years, there is no reason to suppress the data, since it could not even in theory be used in the manner NASBA opines that it could be used.[169/]

As demonstrated by the attached statement of University of Georgia Professors C. Ann Hollifield, Dwight E. Brooks and Lee B.

166/ See EEO Supporters Comments, pp. 135-36.

167/ See EEO Supporters Comments, pp. 133-34. AFTRA agrees, suggesting that "the Commission could hold the data confidential at least for a period of time" while still preparing annual, industry-wide summaries of the data for public review. AFTRA Comments, pp. 21-22.

l68/ See EEO Supporters Comments, p. l35 n. 294 ("[m]ajor labor force adjustments occur at a relatively glacial pace; thus, research derived from labor statistics typically enjoys a shelf life of several years. That is why researchers have long managed to adjust to the U.S. Census' three year delay in the production of its major decennial reports.")

l69/ See EEO Supporters Comments, p. l35.

Becker (Exhibit l), scholars need Form 395 data, and it would would profoundly disserve the industry to suppress this data for no good reason:

> The proposals before the FCC to eliminate the requirement that broadcasters file annual employment reports (Form 395) or alternatively, to permit that data to be classified as confidential or to be published only after all station and market identifiers have been removed, would have a significant negative impact on media scholarship....
>
> In their "Comments of EEO Supporters" ("Comments") a coalition of interested organizations noted that the loss of access to station- and market- specific data would make it more difficult to study the relationship between approaches to employee-recruitment and actual hiring outcomes. This is true. However, that argument reflects only one narrow area of scholarship that would be negatively affected by lack of timely access to station and market-specific employment data. Media research programs in a number of other areas also would be impacted, including research into news construction, the media labor market, and studies of media management and economics in general where the labor market is an independent variable....scholars are only beginning to understand the specific mechanisms through which individual, organizational and market variables interact to influence media content....
>
> That the internal organizational structures of media companies shape media content and programming is no longer seriously disputed by scholars. Nonetheless, there has been relatively little research on the nuances of the relationships between minority employment and programming. To give a few examples, it would be useful to know whether organizational demography affects news content differently during times of routine programming and times of major events of gender/ethnic/racial concern. Research is also needed on whether different types of media have stronger employment/content relationships; whether different types of jobs have greater or lesser effects on programming and content; whether ownership or format choice has greater influence on non-form programming content, and whether employment in stand-alone or in consolidated media operations appears to have more influence on programming. It also would be useful to know whether it is the statistical

representation of minority or female employees, or whether it is the commitment of an employer to promoting diversity (as measured by its participation in community-based outreach activities or its adoption of workplace quality initiatives such as mentoring programs) that appears more closely tied to programming. Without readily available station-specific and market-specific employment data broken out by job type, race and gender, none of this important research on one our most important industries can be performed....

Research into media labor-market issues is a relatively new area of study among journalism and mass communication scholars. Such work as has been done has identified a number of factors that affect the media labor market, including the demography of the surrounding community (Sikes, 2000; Whittaker, 2000), the culture of the media organization itself (Hollifield, Kosicki and Becker, 1999) and the specific elements of educational preparation that entry-level job seekers bring to the table (Becker, Lauf and Lowry, 2000). However, the ability of scholars to further assist the industry in understanding the issues it faces in the critical area of human capital will depend upon their continuing ability to have timely access to station and market-level data on industry employment outcomes.

Finally, the larger field of media management and economics is still relatively young. Only in the past 15 years have a significant number of scholars turned their attention to studying the economic and managerial dynamics of the industry. Scholars working in media management and economics are focused both on helping the industry improve its business performance, and on helping industry leaders, policy makers and the public understand the ways in which the economic and managerial dynamics of the media industry influence media content and, ultimately, society. While some of this research can be conducted at an industry-wide level, achieving in-depth understanding requires use of a smaller sample that can be more carefully studied and controlled. In such research, labor may well serve as a crucial independent variable. To allow station- and market- level employment data to be classified as proprietary, or to report it only when aggregated at the industry level, is to cripple researchers' ability to study the dynamics and effects of the human-capital intensive media industry.

That such research is important is difficult to argue. Communication industries are one of the critical infrastructures necessary to the efficient functioning of every society. The "Comments" have thoroughly outlined many of the sociological and policy issues and benefits derived from understanding the relationship between employment diversity and media performance. Among the major issues they have addressed are the impact of organizational diversity on organizational creativity, problem solving and ability to compete in global markets; the impact of discrimination or failure to recruit diversity in small-market stations on the ability of large-market stations and networks to

achieve diversity because of career-path flows in the industry and the subsequent long-term impact on those larger organizations to achieve global competitiveness, and the impact of organizational diversity on the broadcast industry's ability to provide the public with the full range of media products and services that should be available. We fully support the argument in the "Comments" that these issues are of major importance to the public and that further research is needed

in order for scholars and policy makers to fully understand them. Employment data on race, gender and job title at the market and station levels are required in order to conduct such research.

The possible loss of access to broadcast industry employment data has other potential effects of social science research in support of policy that the "Comments" did not address, however. One of the most significant of these research areas is the economic impact of mass media and telecommunications industries on society.

The media's impact of society is not merely social, it is also economic. The media are a critical and growing industry in the U.S. economy, and their economic performance and success is of interest to policy makers on that basis alone. However, perhaps more importantly, in the age of the information economy, both traditional and new media play a central role in feeding economically valuable information to other businesses and industries of all types, affecting the ability of those enterprises to compete effectively in the global market.

Since the early l980s, the United States' national and international information and communication policies have increasingly been shaped by recognition of the media's critical role in the larger economy (Hollifield & Samarajiva, l994; Hollifield and McCain, l995). As the "Comments" noted, organizational research has demonstrated that industries' competitive performance, creativity and problem solving are generally enhanced through employment diversity. Given the potential impact that media companies have on other businesses and industries at the local and national levels, both government and the public has an interest in thoroughly understanding the factors that shape those media enterprises' behavior and decisions. As the media industry's importance as an economic - as well as social - infrastructure increases in the future, researchers and policy makers should have access to the data they need to fully understand the factors that media performance.

We, therefore, respectfully request that the Commission continue to require timely public access to broadcast employment data, including gender and racial data, since this data is essential to a full understanding of the impact of the labor market on competition and diversity. We further request that in order to permit such scholarly research in this area to continue unimpeded, this data

should be made available with station and market specific identifiers in place.

After discussing our proposed compromise with proponents and opponents of the EEO rule, we are more convinced than ever that the Form 395 issue should be severed, for the reasons we initially gave

and for an additional reason discussed below: the record is barren of any comments discussing the experiences of sister agencies that collect similar data. We amplify below.

Very often, a unique provision of a rule has purposes that overlap two distinct regulatory objectives. Where the unique provision's primary purpose is far more closely related to one regulatory objective than the other objective, it is better to place the unique provision into a docket that corresponds with the unique provision's primary purpose.[170/]

That is precisely the case here. Form 395 has two and only two purposes. One of them is dictated by 35 years of jurisprudence in employment discrimination law that the FCC is not at liberty to repeal: the hiring of women and minorities happens to be quite relevant, in corroboration or mitigation, when a prima facie case of race or gender discrimination is presented[171/] -- a critical

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170/ Cf. Mobil Oil Exploration v. United Distrib. Co., 498 U.S. 211 (1991) (holding that an agency addressing a global issue is not required also to address related issues in the same proceeding).

171/ As LCCR notes, the Commission's representation that Form 395 will not be used as part of the EEO compliance process must be taken to mean "that these reports will not be used to determine whether outreach efforts were effective....The Commission has not (nor could it) disclaim reliance on the cases that hold that statistical evidence relating to hiring is irrelevant to a case of intentional discrimination in hiring." LCCR Comments, p. 18 n. 12. See also EEO Supporters Comments, p. 133 (discussing the use of statistical data in discrimination cases.) NASBA suggests that because Form 395

data is useful in hiring discrimination cases, it would be "too easy...to make claims that a station's recruitment efforts are impermissibly inadequate or that the station engages in discrimination." NASBA Comments, p. 50; see also NAB Comments, p. 62 (to the same effect). That would not be "easy" at all, since the Commission has promised to dismiss such allegations without consideration. See First R&O, 15 FCC Rcd at 2418 ¶225-25; see also Second NPRM, 16 FCC Rcd at 22858 ¶50.

use, albeit one NASBA mas mischaracterized.[172/] But there is another -- and far more common -- purpose of Form 395. Form 395's primary purpose is to assist the Commission and scholars to evaluate, in rulemakings, whether EEO regulations are effective, and whether the means used to implement these regulations are

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172/ NASBA misstates a key point in the 1999 EEO Supporters Comments regarding the use of Form 395 statistics. NASBA states that "[i]t is crucial to note that the Minority Media [and] Telecommunications Council ("MMTC") stated in its comments on the earlier *NPRM* in this proceeding (at 315) that it would review the Annual Employment Reports and would 'liberally draw inferences from statistics' in investigating whether broadcasters hafe discriminated." NASBA Comments, p. 50. NASBA's point is that the "public filing of such reports" would create "'pressure' on broadcasters to recruit and hire based on race and gender[.]" Id., p. 49. Actually, MMTC does not and never has participated in adjudications and did not say that it would use data in this way. Here, instead, is what the EEO Supporters said in 1999:

> The FCC's statistical review should be comparable to a thoroughly investigated EEOC systemic or class action case. These investigations liberally draw inferences from statistics, and the FCC should do so as well.
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> Third, the Commission should employ refined statistical tools to evaluate the likelihood that a station's recruitment strategy and results (or, where there is other extrinsic evidence of discrimination) its employment profile is attributable to discrimination. The Commission should employ generally accepted tests of statistical significance where the numerical levels are great enough.

1999 EEO Supporters Comments, p. 315 (fns. omitted; emphasis supplied). Thus, the EEO Supporters were simply explaining that the FCC should treat statistical evidence the way the EEOC treats it. In particular, as the EEO Supporters noted, the EEOC will not examine statistical evidence unless there is "other extrinsic evidence of discrimination" (id.) but the EEOC has for over thirty years used well established

statistical tests to evaluate such evidence to the extent it is probative. As LCCR notes, "[t]he Commission has not (nor could it) disclaim reliance on the cases that hold that statistical evidence relating to hiring is irrelevant to a case of intentional discrimination in hiring." LCCR Comments, p. 18 n. 12 (discussed above).

reasonable.[173/] Form 395 data (sometimes including race and gender statistics, sometimes not) is also used in structural media ownership rulemakings, since ownership structure and employment trends influence one another.[174/] If the Form 395 issue is resolved in this proceeding, some broadcasters will assert (seriously or not) that Form 395 must be primarily intended for EEO adjudications -- for no other reason than because it is in this docket.[175/] We suspect that the real purpose of this argument is to set the Commission up for a faux constitutional fight.[176/] After all, it is the manner in which statistical data is used, and not the content of the data itself,

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173/ See Second NPRM, 16 FCC Rcd at 22858 ¶¶50-51. See also EEO Supporters Comments, pp. 122-131, which discusses the uses of Form 395 data in research, and explains why aggregation of Form 395 data would frustrate the most significant uses of the data for scholarship, including regression and correlation studies across station sizes and types, market sizes, program formats, as well as analysis of variance studies comparing outreach methods with employment patterns on a global, industrywide basis.

174/ See, e.g., Comments of MMTC in MM Docket No. 01-317 (Local Radio Ownership) (filed March 19, 2002), pp. 62 and n. 112 (discussing impact of conssolidation on broadcast employment generally).

175/ This argument has already been made, although not in those exact words. See NASBA Comments, p. 40 (acknowledging that the court in MD/DC/DE Broadcasters held that Option A did not pressure broadcasters into recruiting on the basis of race, but claiming that the court left open the question of whether Option A (read together with Form 395) pressured broadcasters to hire minorities who had been recruited. The argument is absurd, since there is no way a broadcaster could

receive any advantage or avoid any disadvantage at the FCC by hiring on the basis of race.

l76/ Recall that NASBA and NAB contend that the industry has made great progress in diversity. See NASBA Comments, p. l2; NAB Comments at l0. It is peculiar that these organizations are trying to eliminate the very tool that measures that progress and that could illuminate when and how further regulation in this area will become unnecessary.

that determines its constitutionality.[177/] Recall, further, that the public availability of Form 395 data drew no controversy at the FCC for thirty years. Recall, too, that the public availability of similar data in the field of higher education draws no controversy today -- except at one university.[178/] Nonetheless, the Commission is faced with a court that has twice deployed improbable hypotheticals to strike down EEO rules. In Lutheran Church, the Court held that the 50% of parity "screen" somehow "pressured"

177/ As LCCR points out, "the mere possibility that such data will be used by the government for an impermissible purpose cannot, of itself, preclude the collection." LCCR Comments, p. 13. See, e.g., Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("[t]he Equal Protection clause does not forbid classifications. It simply keeps decision makers from treating differently persons who are in all relevant respects alike"); U.S. v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976), cert denied, 429 U.S. 1023 (1976) ("possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data. Statistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted. And any positive steps which the United States might subsequently take as a result of the interpretation of the data in question remain subject to law and judicial scrutiny.") If the theoretical possibility of misuse of information were sufficient cause to suppress the information, the Department of Education could not publish a chemistry book (someone might make a bomb); the FBI could not publish a crimestoppers guide (criminals might use it) -- and the National Science Foundation could not publish a book of mathematical formulas (someone might use them to develop and then misuse racial statistics.)

178/ Bob Jones University. See "Good Luck! Bob Jones University Looks to Recruit Black Students," Journal of Blacks in Higher Education (Spring, 2002), pp. 65, 66 (reporting that "Bob Jones University states that it has no idea exactly how many black students are enrolled at Bob Jones because it does not keep racial data on the makeup of its

students.") Every other major university in America is proud to release to the public its annual breakdowns of students and faculty by race and gender. Yet NAB and NASBA are seeking to import the Bob Jones University standard for racial statistics into communications law.

licensees to hire minorities to avoid an audit,[179/] and in MD/DC/DE Broadcasters the Court theorized that a broadcaster might draw the money needed to buy an ad in a minority newspaper from the account it had been using to advertise in another newspaper that reached White people.[180/] Compared to the hypotheticals in those cases, the argument that "Form 395 is in the wrong docket" at least has

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179/ In Lutheran Church, the 50% screen should not have been an issue because the Church's radio stations never said they were "pressured" by the screen to hire an unqualified person. Instead, these fairly large stations in St. Louis had not (with one disputable exception) ever hired African Americans in the top four categories. The licensee attempted to excuse itself by saying that it didn't need to recruit African Americans because they don't listen to classical music and thus could be presumed unqualified to work at a classical station. When the 50% screen was in effect, the screen never triggered an "audit"; instead, it meant only that someone in the understaffed FCC EEO branch actually read the license renewal application. Stations that employed no minorities but had even minimal recruitment programs always received unconditional renewals. None of that mattered to the Court because it was at least theoretically plausible that some station, somewhere, might be in such fear of an "audit" that the station would hire, and endure the services of unqualified persons in order to avoid an "audit."

180/ In MD/DC/DE Broadcasters, the Court struck the rule based on a hypothetical under which a broadcaster with a "finite" recruitment budget shrinks its ad in the daily paper in order to find the money to put an ad in a "minority" paper. Id., 236 F.3d at 20-21 n. **. This hypothetical came from the Court itself, so there was nothing in the record about how much an ad in a "minority" paper actually costs. Official notice is respectfully sought that the actual cost of a standard size (column-inch) help-wanted ad in the dominant African American newspaper in Washington, D.C. is $15.03. See Washington Afro American, May 25, 2002, p. D-5. In retrospect, the fear that this $15.03 might come out of the pocket used to recruit White people was enough to get the entire EEO rule stricken.

some marginal logic to it,[181] irrespective of its hollowness as a practical matter.[182]

Putting Form 395 into a new proceeding would mean that the release of Form 395 data to the public will be delayed even longer. The Republic will survive, however. As Commissioner Martin notes, it is more important that the Commission get this right.[183]

Review of the initial comments in this proceeding discloses a serious evidentiary deficiency that further militates in favor of severance of the Form 395 issue: there are no comments from agencies that receive, disseminate, or review similar statistics.

181/ If Lutheran Church and MD/DC/DE Broadcasters stand for anything, it is that an EEO rule cannot give rise to even a grossly implausible hypothetical instance of "reverse discrimination," as long as the underlying hypothetical is logically sound. It is implausible that some broadcaster would disbelieve the Commission's repeated promises not to use Form 395 to evaluate recruitment, with such disbelief being grounded in nothing more than the fact that Form 395 happens to be in this docket. Indeed, the Commission expressly stated that "the FCC Form 395-B is not a part of our EEO program requirement and is in fact required pursuant to a separate provisions of our rules, Section 73.3612. Second NPRM, 16 FCC Rcd at 22858 ¶50. Still, it would not be beyond the pale of logic to ask why the Commission did not create a new docket devoted just to §73.3612.

182/ Broadcasters know that just because an issue arises in a proceeding driven by other purposes, the Commission's decision on the issue must be construed based on what the Commission says in its Report and Order -- rather than on the title of the proceeding or the disposition of unrelated issues in the same proceeding.

l83/ There are good reasons to groan that MD/DC/DE Broadcasters and Lutheran Church reflected judicial activism run riot. See, e.g., "FCC Response to Petitions for Rehearing" in MD/DC/DE Broadcasters, D.C. Cir. No. 00-l094 (filed March 2l, 200l) ("[t]he Court pointed to nothing in the agency record, and we are aware of nothing, to support the Court's conclusions that...broad outreach efforts will result in non-minorities being deprived of information abou employment opportunities.") However, "[t]wice the courts have struck down this agency's EEO rules as unconstitutional and we must make sure that we give proper heed to the courts' instructions." Second NPRM, l6 FCC Rcd at 22875 (Separate Statement of Commissioner Kevin J. Martin).

The EEOC, the Department of Education, the Labor Department and OFCCP, the National Telecommunications and Information Administration of the Department of Commerce, the Office of Advocacy of the SBA, the U.S. Commission on Civil Rights and the Civil Rights Division of the Department of Justice did not file comments in response to the Second NPRM. By creating a new docket just for the Form 395 issue, the Commission could ask its sister agencies and departments for their views and thereby ensure that its ultimate decision is in harmony with civil rights jurisprudence and practice throughout the rest of the federal government.[184/]

Thus, we again ask that the Commission move the Form 395 issue, and the record compiled thus far on that issue, into a new docket. The docket could be entitled "Broadcast Labor Force Statistics." Upon opening that docket, the Commission should ask sister agencies that handle similar data for their views. Divorcing Form 395 from this EEO enforcement docket will both more accurately reflect the purpose of Form 395, dispel any impression lay observers may have that Form 395 has some hidden improper purpose, and allow the Form 395 issue to be debated and resolved with light rather than heat.

184/ One comment did address the similarity between Form 395 and data collection in other agencies. LCCR, whose expertise on this subject is unparalleled, states that "data collection and reporting requirements - even those requiring the collection of information about race - are part and parcel of

dozens of federal statutes and programs, and have never been held to impose a racial 'classification' of any kind. Accordingly, such requirements may be reviewed only to ensure that the government has a rational basis in imposing them, a test the Commission can manifestly satisfy here." LCCR Comments, p. 6. We agree absolutely, and are confident that a record that draws on the experience of other agencies and departments will also compel this conclusion.

II. All Requests For Exemptions From The Rule Should Be Rejected

A. Compliance Is Neither Arduous Nor Complicated

The concept that broadcasters should be exempt from EEO compliance is deeply flawed. EEO compliance is a privilege, not a "burden." Discrimination is a burden, and the risk that discrimination will not be prevented is a burden. Preventing race discrimination in any industry is an interest of the "highest priority."[185/]

Compliance with the proposed rule is not arduous,[186/] a conclusion the Court upheld in 2000 in rejecting a "burdensomeness" argument under the arbitrary and capricious standard.[187/] Nothing has happened since 2000 to change that conclusion. Objections based on arduousness are unsupported by any data other than the subjective impressions of self-interested broadcasters, and by a thoroughly discredited, unscientific 1994 TAB estimate of compliance costs under the far more aggressive 1971 rule.[188/]

185/ Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976).

186/ See EEO Supporters Comments, pp. 62-68.

187/ See MD/DC/DE Broadcasters, 236 F.3d at 18.

188/ NASBA cites a 1994 study by the Texas Association of Broadcasters (TAB) claiming that its state's broadcasters incurred a $14.8 million "paperwork burden" for EEO each year. NASBA Comments, p. 6. The study was based on unverified self reporting by a nonrepresentative sample of licensees. In a state with about 300 employment units, $14.8 million would add

up to almost $50,000 per employment unit per year, or the cost of engaging a fulltime middle management employee at each station to do nothing but EEO. In real life, EEO compliance efforts under the 1971 rule consumed minutes per day, if that much. See discussion in the Reply Comments of MMTC, MM Docket No. 96-16 (EEO Streaminling) (filed October 25, 1995), p. 8 n. 12 (citing Reply Comments of NOW, p. 7, to the effect that "TAB's estimates appear to include all personnel-related matters, rather than just EEO."

Objections that the rule is too complex or difficult must be viewed in the light of 30 years of experience. During that time, not a single broadcaster claimed that it suffered any material financial hardship because of the need to comply with the EEO rule. Nor did any broadcaster ever claim the rule was too difficult to comprehend. There is simply no record evidence showing that the proposed rule is unreasonable.

B. There Are No Justifications For Exemptions

1. There Is No Basis For A Size Exemption

Various commenters seek a station or market size exemption, with one commenter even suggesting (without explanation) that the cutoff should be 25 employees.[189/] Another commenter repeats its previous request for an exemption based on the racial composition of the market.[190/]

189/ See Various Radio Licensees Comments, p. 3.

190/ See NAB Comments, pp. 58-59 (suggesting an exemption for stations in areas with minority labor forces of less than 5%, on the theory that the rule "essentially forces 'stations to find minorities where none live.'") However, the proposed rule does not "force" or even expect stations to "find minorities" at all. Therefore, although NAB did not intend this, its objection risks having the rule be regarded as a race-based classification (favoring nonminorities, who would be recruited irrespective of their presence in the population.) Furthermore, even if a group, irrespective of how it is defined, comprises but 3% of a community, there is no reason why recruitment should not be broad enough to reach members of the group. No talented person should be excluded from a chance to contribute to the industry based on how many people in her neighborhood share attributes unrelated to talent.

The Commission should not exempt small or small market stations from the rule.[191/] Broadcast careers begin in small and small market stations. Cutting off EEO protection at these points of entry would have a ripple effect on the rest of the industry.[192/] A size exemption would mean that large and large market broadcasters that do not discriminate will have less diverse, and thus less talented pools of employees from which to draw. For example, a nondiscriminator in Pittsburgh will be injured if its feeder station is a discriminator in Altoona. In any event, the proposed rule is already tailored to station size, so smaller stations have no legitimate grounds for complaint.[193/]

Any cutoff must involve some number,[194/] so it bears repeating why the five and ten employee cutoffs (as used in Prong 3) make

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191/ See Second NPRM, 16 FCC Rcd at 22857 ¶48 (small stations "have an important role in providing entry level opportunities into the broadcast industry"); 1987 EEO R&O, 2 FCC Rcd at 3970 ¶22, in which the Commission retained the five-employee size cap because it "recognize[d] that small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field." See also NAACP Comments, p. 3 (exemption would "cut off large numbers of minority employees seeking midlevel career enhancing opportunities for advancement" and "severely restrict the opportunities to obtain" positions offering "unique first-time employment opportunities for those seeking to 'break into' the industry"); EEO Supporters Comments, pp. 97-103 (to the same effect).

192/ See EEO Supporters Comments, pp. 24-29 (demonstrating that the EEO rule is justified to promote competition since labor is the key input into production and artificial

restrictions on the availability of labor would impair the competitiveness of firms and of the industry as a whole.)

193/ See Second NPRM, 16 FCC Rcd at 22852 ¶29 (proposing that small stations need perform only two Prong 3 options rather than four).

194/ See Sinclair, 284 F.2d at 162 (some line drawing is unavoidable, although lines drawn must be supported with a "reasonable explanation").

sense. Five employees is, roughly, the minimum size of a station that does not simulcast or broadcast from a satellite feed. For example, a five-employee station might employ (with job function overlap) a GM, an SM, a morning announcer, and two salespeople; part-timers may also be engaged to do accounting, play by play sports and swing airshifts. Such a radio station is an attractive initial point of entry. A ten-employee radio station is large enough to permit each employee to do a single nonoverlapping job, and it is large enough to support internships and training positions. It is a full service radio station capable of incubating and developing new talent.[195/] Consequently, it makes sense for a station with at least five employees to recruit broadly and perform some outreach, and it also makes sense for a station with at least ten employees to recruit broadly and perform comprehensive outreach.

Even if, as one commenter suggests, small stations have difficulty attracting employees,[196/] that difficulty would not be cured by exempting small stations from broad recruitment and outreach. Actually, broad recruitment would help small stations

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195/ There appear to be 1,647 radio stations (29%) with six or fewer employees and 2,367 (42%) with nine or fewer employees. There also appear to be 387 (24%) television stations with six or fewer employees and 477 (48%) with nine or fewer employees). Finally, there appear to be 1,235 cable operators (37%) with six or fewer employees and 1.781 (46%)

with nine or fewer employees. See U.S. Census Bureau, Establishment and Firm Size - Information Subject Series, 2000, Table 2. Census data does not show figures for stations with five and ten employees.

196/ See NAB Comments, pp. 54-58 (suggesting that small stations or stations in small markets, face difficulties in attracting employees.)

who unwisely resist it, since broader outreach means more applicants.

One commenter suggests exempting parttime positions from recruitment obligations.[197/] This objection is poorly taken, since parttime positions are often the primary means of entry into broadcasting.[198/] Indeed, with consolidation, parttime employment is the fastest growing sector of the broadcast labor market. Further, as the Association of Public Television Stations (APTS) accurately points out, "[f]ailure to acknowledge those employees gives an inaccurate picture of the licensee's EEO efforts."[199/]

2. There Is No Basis For A Public Agency Exemption

Some commenters suggest that noncommercial or public agency licensees should be exempt from various portions of the proposed rule. APTS suggests allowing "governmental or university noncommercial licensees to satisfy the Commission's EEO recruitment requirements by demonstrating their compliance with established state or municipal government-mandated or university-mandated EEO recruitment requirements."[200/] The School Board of Broward County

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197/ See Curators Comments, p. 4.

198/ Citing the RTNDA/Ball State University 2000 News & Staffing Survey (2001), NOW points out that parttime employees are 31% of radio news staffs and 13% of TV news staffs. NOW Comments at 9 and n. 38.

199/ APTS Comments, p. 10.

200/ APTS Comments, p. 2. See Curators Comments, p. 3 (to the same effect). APTS contends that public broadcasters' EEO record is superior to that of the commercial sector of the industry. APTS Comments, pp. 3-5. However, EEO compliance is not punishment, and removing EEO rules is not a Pavlovian reward for having a good EEO record. Instead, EEO rules are a means of opening the industry to all Americans.

suggests that it is subject to "redundant" EEO requirements,[201/] but it offers no side-by-side comparison showing that the FCC's requirements are lesser-included within other agencies' requirements.

APTS' approach risks that some licensees would be held to different baseline standards than others. After all, some regulatory overlap is inevitable under federalism. Even if there is some overlap, local requirements are subject to constant change. The Commission cannot be expected to analyze its rules side by side with those of hundreds of other agencies to be sure that its rules are lesser-included for each licensee in every respect. Instead, if a licensee is complying with rules similar to the FCC's rules, and it is maintaining records that document its compliance, the licensee will incur no additional substantive "burden" and almost no additional reporting "burden" attendant to the FCC's requirements.

3. There Is No Basis For A Blanket Religious Exemption, Although The Commission Should Clarify Its Treatment Of "Co-Religionists"

Trinity states that requiring it to recruit widely among co-religionists would "substantially burden [its] religious practices in the absence of [a] coordinate compelling government interest served by the least restrictive available means."[202/] This is a serious objection that is entitled to respect.

However, Trinity is unspecific in identifying how the requirement that its broadcast stations notify its co-religionists of job

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201/ School Board of Broward County Comments, p. 2.

202/ Trinity Comments, p. 5.

openings burdens the free exercise of its faith.[203/] Trinity only states that recruiting among co-religionists "interferes with [its] internal, inherently religious process of self-definition[.]"[204/] By failing to assert how its faith is violated by this requirement, Trinity has failed to meet the minimum requirement for a Free Exercise claim.[205/]

Under the Free Exercise clause, asking religious organizations to abide by neutrally applicable non-discriminatory regulations is well within constitutional bounds of government. Status as a religious organization does not necessarily exempt it from broad, nondiscriminatory recruitment. The Free Exercise Clause requires religious tolerance but does not require that special exemptions be made for religious groups when it comes to neutral, universally applicable laws or regulations.

203/ Trinity suggests that the EEO rule might not allow endorsement of infant baptism or refusal to accept women in pastoral ministry. Id., p. l3. These practices would not violate the proposed EEO rule, however. It would be helpful if the Commission would expressly say that, in case there is any doubt.

204/ Id., p. 6. Trinity also suggests that a consequence of the EEO rule will be "subpoena, discovery and cross examination." Id., p. 7. Actually, in the EEO context these consequences have flowed only from hearing designation orders issued when there was evidence of intentional discrimination -- a practice Trinity expressly eschews. Id., p. 3 ("the practice of treating others differently in employment opportunities because of race considerations, ethnic variations, or gender cannot be justified doctrinally in the Christian faith.") In theory, a licensee that deliberately refused to comply with the recruitment regulations could face

a hearing, but Trinity does not contend that its religious faith compels it to violate a regulation that is otherwise valid. Thus, the only issue the Commission should consider is whether the recruitment obligation (within co-religionists) is valid under the Free Exercise Clause.

205/ As far as we are aware, no religion teaches that it is wrong to take race and gender neutral steps to prevent race or gender discrimination in employment.

"[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[206/] Laws are designed to govern actions, and although they may not interfere with religious beliefs and opinions, it is possible that they may interfere with actions.[207/] The right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability" on the ground that the law proscribes conduct that his religion prescribes.[208/]

If government regulations prohibit conduct that is religiously motivated, the government must show a compelling interest that is achieved through the least restrictive alternative.[209/] However, strict scrutiny does not apply to a neutral law.[210/] Therefore, laws and regulations need not be justified by a compelling interest, as long as they are general laws that are neutrally applicable to secular as well as religious organizations.[211/]

206/ Employment Div., Dep't. of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-9 (1990).

207/ Id. at 879.

208/ Id.

209/ Bob Jones University v. U.S., 461 U.S. 574, 604 (1983) (holding that denial of tax exempt status based on religiously motivated racial discrimination was constitutional); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that child labor laws preventing Jehovah's witnesses

from distributing religious materials in the streets were constitutional).

2l0/ See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (l993) ("Hialeah") (invalidating town ordinance directly aimed at proscription of religious sacrifice of animals); Oregon v. Smith (holding that no religious exemption existed to Oregon's laws proscribing ingestion of Peyote).

2ll/ Hialeah, 508 U.S. at 53l.

The proposed EEO rule is aimed at preventing discrimination. The rule would apply to any and all media outlets, universally and neutrally. Any imposition that this important mission may have upon a church, or any other entity, is merely incidental and would likely be reviewed under rational basis scrutiny. Even if the rule were reviewed under strict scrutiny, prevention of race discrimination is a compelling interest and requiring broad non-discriminatory recruitment is narrowly tailored to meet that goal. It is neither under-inclusive nor overly inclusive, since it targets exactly what it seeks to prevent.

Consequently, in order to show that the regulation is unconstitutional as applied to Trinity's recruitment of employees, Trinity must show that the regulation was directed at Trinity in an effort to curtail its religious practices.[212/] Trinity must also show that there is no compelling interest justifying the regulation, and, even if there is a compelling interest, the regulation is not narrowly tailored to that end. Trinity has not shown any of these things.

Much like the Native American Church in Oregon v. Smith, Trinity is incidentally burdened by a neutrally applicable law that is well founded. The church members in Oregon v. Smith sought an

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212/ The issue of whether the religious activity is "central" to the religion need not be determined when evaluating a

Free Exercise Claim. See Oregon v. Smith, 494 U.S. at 886. Evaluating the centrality of a religious notion or ideal will not factor into the analysis of whether a restriction on that notion or ideal is constitutional. Id. Rather, the determining factor that determines the standard of evaluation for Free Exercise claims is whether the regulation causing the alleged burden is universal and neutrally applicable, not whether an important tenet of the faith is imposed upon. See id.

exemption from a law they disagreed with because it inconvenienced them, but inconvenience was not a sufficient reason to strike down the law. Many laws are inconvenient to those who must abide by them.

Nonetheless, Trinity is entitled to an assurance that the Commission will not substitute its judgment for a religious broadcaster on the question of who is a "co-religionist."[213/] We would not object to such a clarification.[214/]

Trinity's objection is a serious one, even though we do not agree with it. Nonetheless, the manner in which it is resolved is not central to the substance of the rule as applied to nonreligious broadcasters, or to the substance of the rule if it is applied to religious broadcasters subject to the co-religionist exception. Consequently, to avoid delay and a possible third remand and vacation of the entire rule, the Commission should expressly state that it intends for this portion of its decision to be severable.[215/]

213/ Trinity contends that EEO rule would "effectively compel [it] to employ those who do not share their religious faith and ideology." Id., p. 17.

214/ Inevitably, someone will point out that the Commission may someday be faced with a construction permit application by the "World Church of the Creator," which defines its co-religionists as "Aryans." However, a co-religionist must be affiliated in some way with the faith. Assuming for the sake of argument that this is even a church, all of those affiliated with it are White Americans, but virtually all White Americans are not and never would be affiliated with it.

215/ See pp. 96-97 infra.

III. Trade Associations' Proposed Substitute Plans Are Unworthy Of Serious Consideration

In 2000, the Commission concluded an extensive proceeding on this subject. Thus, the Commission has already reached tentative conclusions. Consequently, in the Second NPRM, the Commission made it very clear that proposals that would "modify the rules in a way that would compromise our goal of ensuring broad and inclusive outreach in the community for virtually all full-time job vacancies" will not be considered.[216/]

Unfortunately, the NAB and NASBA have ignored this holding and plowed ahead with nonserious proposals that would patently eviscerate EEO enforcement. The NAB's and state associations' alternate recruiting proposals are neither credulous nor constructive. These proposals would ensure that discriminators will never be brought to justice and that broad recruitment will never become the industry norm.

A. The NAB's Alternate Recruitment Regime Would Allow Broadcasters Who Write Two Checks A Year To Do No Broad Recruitment

We dwell only briefly on the NAB's proposal, since it incorporates NASBA's proposal as an option.[217/]

The NAB's plan actually would require no recruitment at all! One could fully comply with the NAB's plan by recruiting entirely by word of mouth, if one just performs two "general outreach initiatives" such as having a booth at a convention, having a

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2l6/ Second NPRM, l6 FCC Rcd at 22850 ¶2l.

2l7/ NAB Comments, p. l7.

training program or creating a scholarship.[218/] Thus, if a broadcaster awards a scholarship (e.g., for the children of incumbent employees, as is common in the industry), has a booth (at a broadcaster's convention, as is common) and says that it provides "training to upgrade the skills of its employees" (like Form 396 EEO programs always did, meaninglessly) it will have performed three initiatives without reaching anyone in the outside world. A broadcaster could also fully comply with the NAB plan just by making two small corporate donations every year -- e.g., $100 for a scholarship and another $100 to a university's broadcast school -- and do nothing else. It could do 100% word of mouth recruiting and still comply. Such a transparently ineffective plan is unworthy, except for wrapping fish.

B. The State Associations' Internet Proposal Would Not Bring About Broad Outreach

In our Comments, we agreed that the Internet has a place in EEO recruitment, although that place is neither primary nor exclusive.[219/] We suggested a six-point test to determine when the Internet will have evolved to the point that it could become a primary means of recruitment.[220/]

218/ Id. at 22-24.

219/ See EEO Supporters Comments, pp. 104-15.

220/ See EEO Supporters Comments, pp. 114-15 (urging, inter alia, that all non-confidential, non-emergency jobs be posted, that each state website link to and post on a central,

one-stop site and to several sites specializing in equal employment opportunity, that job candidates be able to post resumes on each site without charge, and that "[t]he websites provide a mechanism by which new entrants can arrange interactive, face-to-face, in-person contact with those who can mentor them and help them prepare for careers in the industry.")

A number of commenters generally agreed with our approach. As NCTA concludes:

> While the Internet and newspaper advertising are important vehicles for publicizing job opportunities, these mechanisms may not succeed in doing a sufficiently effective job throughout the cable service area. The necessary result is that potential applicants located in the excluded areas would not be participating in the cable operator's recruitment processes on the same basis as those within the recruited areas. This result would be antithetical to the fundamental requirement that recruitment sources must be calculated to reach the entire community. 221/

One of the many difficulties with Internet recruitment is that the Internet may be inherently incapable of preventing discrimination. While agreeing that the Internet has a role to play in recruitment, AFTRA notes that there is a "general perception among employees and applicants" that "jobs 'posted' on the Internet and in 'job banks' are illusory or 'just for show' because the positions have already been filled."[222/]

The Internet is still in its infancy. Many killer apps have been killed, as anyone who invested prematurely in dot.com stocks is painfully aware. There is little data on what works in Internet

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221/ NCTA Comments, p. 5.

222/ AFTRA Comments, pp. 15 and 16.

recruitment,[223/] and the data that does exist is weak.[224/] MMTC's study of the state broadcast associations' sites demonstrated that many of the state association sites do not even include job postings, about half do not accept resumes, and some do not exist

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223/ NASBA cites "page views" as a measure of traffic at its site. NASBA Comments, p. 22. However, as BCS points out, "Internet 'hits' are merely a measure of the number of visitors to a site, and they do not indicate whether any of those visitors took any subsequent action to apply for any of these jobs." BCS Comments, p. 7. Better measures of the efficacy of a job site are the number of jobs posted (very few, so far) and the number of people hired. The only evidence in the record that anyone got a broadcast job from Internet recruiting is NASBA's anecdote that two people in Iowa got jobs this way. See NASBA Comments, p. 21. NASBA repeatedly invokes the slogan "finding real jobs for real people" (e.g., id., p. 53), but this meaningless sound bite is not a substitute for evidence and rational argument.

224/ NASBA cites to listings on various sites that link to the government site America's Job Bank, claiming that on April 10, 2002, "the category that includes media jobs" contained 5,646 job listings "including postings placed by radio and television stations." NASBA Comments, p. 22. This number, however, is virtually meaningless because it also includes nonbroadcast (newspaper and cable jobs), duplicate listings and stale listings, and because it provides no indication of the percentage of all open jobs that were posted or on the type of jobs that were and were not listed.

at all.[225/] Further, as we noted, racial and economic inequality in Internet access and training continue to undermine its potential

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225/ See EEO Supporters Comments, Exhibit 2, "Summary of Content of State Broadcast Associations' Website Employment Pages" (finding, inter alia, that four states did not have their sites up, that eight states did not have job postings but instead linked to the NASBA site, that eight sites did not accept postings from job seekers, and that three sites did not have any jobs listed. In an industry with over 160,000 jobs, the state sites had 695 jobs (0.4%) listed. Since jobs tend to go unfilled for several days, it follows from this photograph of job postings that most jobs are still not being posted. The underdevelopment of the state association's websites is puzzling, given the ample resources of this $57 billion industry and the huge capital investment made by broadcast stations in their own websites. According to the RTNDA/Ball State University Radio and TV Web Survey (2001), 91% of TV stations and 75% of radio stations operate web sites, 91% of TV stations post local news, and 70% of these TV stations run images on their sites. By comparison, Internet recruiting is not yet a high priority for the broadcast industry. Indeed, NASBA makes a startling admission: more than half of the state associations do not, and do not plan to, promote their job banks "through broadcast spots and announcements or newspaper advertisements." Instead, these state associations will "rely on stations" to promote the availability of job opportunity information." NASBA Comments, p. 14. This will ensure that most of the public will continue to be unaware of the state associations' websites, since PSAs air only intermittently. See Graeme Browning, "Shouting to be Heard: Public Service Advertising in a New Media Age," Kaiser Family Foundation (2002) (finding that while 25% of TV and cable network airtime is devoted to paid advertising and promotions, only 15 seconds per hour (0.4% of all airtime) is devoted to PSAs, and 43% of this airs between midnight and 6 AM, with only 9% during prime time.)

as a means of broad recruitment.[226/]

Nonetheless, even if the digital divide were closed (as it will be, someday), and even if companies and state broadcast associations were to devote substantial resources and creativity toward developing their sites, the Internet would probably still be unsuitable as the exclusive means for recruitment. The reason is that the Internet is inherently impersonal. By placing a communication barrier between the company and the individual, the Internet makes it easier for a personnel officer to avoid the moral consequences of aggressive or unlawful action against individual members of groups he disfavors.[227/] Unlike an in-person interview, or a telephone conversation, the Internet imposes a layer of technological insulation between the employer and the applicant. This technological barrier facilitates the invocation of immoral

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226/ See EEO Supporters Comments, pp. 112-113. The NAB "has difficulty envisioning a situation where any individual conducting an earnest search for employment would not make the Internet one of his or her first steps. NAB Comments, p. 42. Actually, such a situation is easy to envision. Not everyone has a computer, and not everyone with a computer can afford Internet access. Some people work during the hours the public library's computers are available, or the library is inaccessible to them or has no computers and computer training. See EEO Supporters Comments, pp. 112-113. Further, if the Internet were really a one-stop shop for recruitment, no one would bother using the newspaper or community groups as job resources. But obviously, many people still do. See, e.g., Peter Kuhn and Mikal Skuterud, "Job Search Methods: Internet versus Traditional," Daily Labor Report, November 27, 2000, p. E-1 (finding that only 15% of job seekers used the

Internet for job search, and finding a substantial digitial divide by race in Internet job search.)

227/ Anyone who has served in the military is familiar with how personal contact makes it more difficult to act aggressively against an individual. Veterans who suffer from depression and guilt typically were those who engaged in hand to hand combat, not those who dropped bombs on unseen targets from 10,000 feet in the air. Every soldier knows that the hardest weapon to master is the bayonet.

motives, such as race or gender prejudice, as a reason to fail to consider qualified candidates.[228/]

In the hands of the rare person with no conscious or subconscious prejudices, or the even rarer person who is so aware of and in control of her prejudices that she would never act them out, the Internet can be a wonderful tool for expanding outreach and opportunity. But in the hands of most mortals, the Internet can leave members of an adversely-targeted race or gender with little opportunity to establish their individuality, humanity, and qualifications.[229/] A person consciously or subconsciously predisposed against placing women or minorities in certain types of positions will have an easy time clicking a key to reject a pile of

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228/ See Gregory I. Raisin and Joseph P. Moan, "Fitting a Square Peg into a Round Hole: The Application of Traditional Rules of Law to Modern Technological Advancements in the Workplace," 6 Mo. L. Rev. 793, 813-14 (2001) (observing that "[t]he potential for disparate treatment claims with electronic recruiting ('e-recruiting') is another risk associated with the use of technology. Emerging technology raises new issues in the area of personnel recruiting, including whether employers using software that automatically scans resumes for key words or skills, or whether employers using the Internet as their sole method of recruiting violate federal equal employment opportunity laws.")

229/ It is well known that social distance makes it easier for persons to act out their prejudices. An example of a recent EEO case illustrating this phenomenon is EEOC v. Target Stores (complaint filed, citation unavailable) (D. Wisc. 2002). See Linda Bean, "EEOC Sues Target Stores for Racial Discrimination," DiversityInc.com, February 11, 2002 (reporting that the suit alleged that Target employees "'routinely destroyed the applications of African Americans'" and students who attended minority job fairs at Marquette

University and the University of Wisconsin, Milwaukee campus.") Target allegedly decided that it was easy to throw away stacks of resumes submitted by those with whom the company had had little if any personal contact. If this can even happen after a job fair, it would be even easier for it to happen if the resumes were transmitted electronically.

e-mailed resumes.[230/] It would be ironic if a vehicle that is susceptible to enhancing discrimination is touted as the panacea for preventing it.

The interview room beats the Internet for equal opportunity hands down. All but the most cold blooded racist or sexist won't listen to an engaging, talented individual who's looking them in the face. That is why we have contended that the FCC EEO regulation should endeavor to get job candidates into the interview room.[231/] However, that is as far as FCC EEO regulation needs to reach: once an interview commences, human good nature will almost always take over.[232/]

Advances in technology may soften some of the Internet's inherent impersonality. For example, as the cost of homemade digital video comes down and the technology becomes widely accepted, applicants may be able to conduct two-way video job interviews online.[233/] In one of the most useful set of comments _____

230/ To be sure, the Internet may enable those African American or Native American males whose parents did not give them recognizably indigenous names to avoid a race or gender-based prejudice screen. Ideally, the employer would not know the race of such a person until he is interviewed in person or until he shows up for his first day of work. However, the Internet allows a prejudiced personnel officer to quickly and surgically weed out almost all Spanish surnamed, Asian American and female applicants.

231/ See EEO Supporters Comments, pp. l37-45 (explaining why the rule should cover interviewing.)

232/ Id., p. l44 (explaining why it is unnecessary for the rule to

cover hiring).

233/ The Michigan Broadcasters' website already has the ability to accept digital audio files "so potential employers can sample air checks and auditions." NASBA Comments, p. 22.

in this proceeding, Cox Communications has presented a model version of Internet job interviewing software. Cox's interviewing protocol enables at least some of a job applicant's personality to pass through the Internet filter to the company's personnel officers.[234/]

The Commission should always take account of new technology as it regulates. Further, the Commission may have its own role to play in the deployment of technology to foster the agency's regulatory objectives.[235/] That does not mean, however, that the Commission must accept new technology as a panacea for all purposes at all times. The Commission cannot always easily predict how new technologies will evolve.[236/] In EEO, the Internet may someday have its time. But that time has not yet arrived.

If the Commission wants to develop the Internet as a recruitment vehicle, it should engage an independent researcher, under Section 257, to study the Internet, predict its impact on job recruitment and equal opportunity, and suggest how government, industry and the nonprofit sector can maximize the Internet's

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234/ See Cox Communications, Inc. Comments, pp. 2-4 and attachments (explaining the Cox Career Network, which allows job searching by market or by job type, and allows applicants to apply on line, and allows applicants to interview themselves for the job.) The Internet does not get better than this.

235/ See Joseph Belisle Comments at 2, suggesting that broadcasters should be able to post jobs on the FCC website; see also NASBA Comments, pp. l0-ll (to the same effect). The EEO Supporters took a similar approach, suggesting that jobs might be posted on NTIA's website rather than the FCC's site. See EEO Supporters Comments, pp. l46-47. The AEC's experience suggests that it is unwise for an agency to promote and regulate an industry simultaneously.

236/ See Abernathy, 54 Fed. Comm. L. J. at 2l9 ("even with a staff that is second-to-none, the FCC will not be able to predict how technologies will evolve and how the marketplace will adapt.")

positive impact and minimize its potential to exacerbate discrimination.[237/]

C. The State Associations' Proposal To Exempt Half Of The Jobs From Any Recruitment Would Amount To A License To Discriminate

Broad recruitment for all vacancies has been the industry standard, without controversy, since 1976.[238/] Nonetheless, in the most Orwellian moment in this proceeding, NASBA proposes that "a station that meets [NASBA's proposed] requirement to post at least 50 percent of its jobs on the Internet need not be burdened with the expense and effort of justifying why it chose certain jobs for online recruiting and not others."[239/] In other words, a broadcaster could hold back half of the jobs from broad outreach, with no accountability whatsoever.

NASBA's proposal achieves little except to cast doubt on the seriousness and value of the rest of what its comments said. There is no gentle way to put this: NASBA's proposal is a brazen invitation to discrimination. Guess which jobs discriminators will

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237/ This research can be conducted pursuant to Section 257, which provides, inter alia, that the Commission must report to Congress, efvery three years on "any regulations prescribed to eliminate [market entry] barriers." 47 U.S.C. §257(c). A good example of the use of Section 257 in this manner was the production of six research studies on market entry barriers to minority participation in broadcasting and wireless. See discussion in EEO Supporters Comments, p. 6 n. 32.

238/ See Sande Broadcasting Co., 58 FCC 139 (1976). More recently,

the Commission held that "a general notification unrelated to particular job openings is not a substitute for recruitment contacts with sources designed to elicit minority and female applicants as each vacancy occurs." KTEH Foundation, ll FCC Rcd 2997, 2997 ¶23 (l996).

239/ NASBA Comments, p. 47.

post and which ones they will reserve for the old fashioned, old boy word of mouth treatment.

Already, for example, "about half of the jobs posted by members of the New Jersey Broadcasters Association to NASBA's national online job banks were for 'top 4' positions, including station officials and managers, professionals, sales staff and technicians" (emphasis supplied).[240/] But in 1997 (the last year for which aggregate data was available), about 86% of the jobs in broadcasting were in the top four categories.[241/] Thus, unless secretaries turn over extraordinarily more quickly than salespeople,[242/] web postings may already grossly underinclude top four category vacancies.

NASBA's "50%" proposal is arbitrary, legally unsound and disingenuous.

It is arbitrary because it invites the Commission to accept a number drawn out of the sky, without the slightest validation. Where did this number come from? Did someone notice that a coin falls "tails" 50% of the time? Or did someone look up the original Constitution, discover the 3/5 clause and lop off another 10%?[243/]

240/ Id., p. 27.

241/ See FCC EEO Branch, 1996 Trend Report (1997) (latest summary data available)

242/ Actually, the reverse is probably true. See NAB Comments, p. 12 ("many stations are almost perpetually

searching for qualified advertising salespersons because of the relatively high churn rate for this position.")

243/ See Sinclair, 284 F.3d at 162 (criticizing Commission for line drawing that lacks a "reasonable explanation").

It is legally unsound because it would require the Commission to overrule its long line of cases holding that excessive word of mouth recruitment can be discriminatory.[244/]

It is disingenuous because it is presented by the same organization whose comments were grounded in the potential of the Internet for recruitment.[245/] If the Internet is really so effective, and if clicking a key is so easy and cheap, why not use it all the time?[246/]

Think what would happen if broadcasters adopted a "50% compliance" standard for things they regard as really important:

244/ See discussion, p. 24 n. 7l supra.

245/ See NASBA Comments, pp. 2l-29 and 42-48.

246/ See EEO Supporters Comments, pp. 87-96 (explaining how the Commission could carve out an emergency exigency exception to a rule that otherwise requires broad recruitment for all vacancies.)

- "We don't mind if 50% of the low power FM broadcasters learn about broadcast engineering by trial and error on the job." 247/

- "Give us the flexibility to keep our tower lit 50% of the time. We might forget, and electricity is a burden."

- "We promise to make sure that at least half of our programs aren't indecent."

- "The Commission can be at least 50% confident that at least 50% of the statements we make in our applications are not misrepresentations."

- "It is too 'burdensome' to air all the ads we sold you, so you should regard us as having substantially complied with our contract if we air 50% of them."

The earth is not flat, night is not day and recruiting for half of the vacancies is not broad recruitment.

247/ Actually, NASBA sought virtually l00% perfection in LPFM engineering. See Joint Comments of the Named State Broadcasters Associations in MM Docket No. 99-25, Creation of a Low Power Radio Service, August 2, l999, pp. 6-7 ("[t]he creation of low power FM will add a class of novice broadcasters to the airwaves with poor equipment, limited experience, and drastically less financial backing than a professional broadcaster. This will create a liability which the Commission will have to monitor in order to ensure that low power broadcasters and their equipment are operating within established parameters and not threatening the public safety.")

IV. The Commission Should Adopt A Rule In Which It Can Take Pride

A. The Commission Should Expressly Identify All Portions Of The Rule That Are Severable

As the Commission learned to its dismay in MD/DC/DE Broadcasters, the Court will strike down an entire rule if the agency has not expressed, in the most unequivocal terms, which portions of the rule could be excised without reshuffling the structure of the entire rule.[248/] There are at least two such sections of the proposed rule: (1) whether religious broadcasters should receive a blanket exemption;[249/] and (2) how to handle Form 395.[250/] As we have shown, these sections each involve constitutional issues on which the agency's position is the right one. As to the religion issue, Trinity has presented a good faith free exercise claim. As to the Form 395 issue, NAB and NASBA are poised to contend that just the retention of the issue in this docket will be misread as putting "pressure" on broadcasters to reverse-discriminate.[251/] Moreover, the record on the Form 395 issue is poorly developed.[252/]

248/ See MD/DC/DE Broadcasters, 236 F.3d at 23 (severing Option B "would severely distort the Commission's program and produce a rule strikingly different from any the Commission has ever considered or promulgated.")

249/ See pp. 78-82 supra.

250/ See pp. 62-72 supra.

251/ See p. 68 and n. 175 supra.

252/ See pp. 71-72 supra (noting that none of the affected federal agencies and departments filed comments in response to the Second NPRM).

Remand is always more digestible than vacatur. Two non-frivolous constitutional issues are ramped up, and in each issue a lot is at stake -- but each is severable. The Commission should sever the Form 395 issue itself, and it should declare that the free exercise issue is severable from the rest of the rule.[253/]

B. Adopting A Weak Rule Will Not Stave Off An Appeal From Those Who Want No Rule At All

Looking at the record globally, we see broadcasters saying that the way to stop lawlessness is to hamstring the constable. We see broadcast associations trumpeting a "marketplace" solution that their own members have yet to embrace. We see students of evidence saying there is "no evidence" of discrimination, while overlooking mountains of such evidence in the record of this proceeding. We see otherwise rational people saying that thirty years of progress, brought about by law enforcement, justifies less law enforcement even though the task remains far from finished.

And we see mild mannered broadcasters, who hate "pressure," dishing out veiled threats to the agency, grounded in the greedy principle that a little less "paperwork" for a prosperous industry

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253/ The only other potential ground for remand that we had regarded as having legs was the Second NPRM's omission of the text of the proposed rule. See MMTC, Motion for Procedural Relief, filed January 29, 2002, p. 2 ("[p]ublishing the language of the new proposed rules could prevent some of

the disagreements over the Commission's intentions that characterized the proceedings in response to the First NPRM.") Our concern that some commenters would not understand the Commission's proposal turned out to be unwarranted. No commenter suggested that it was in any way confused or inadequately informed about the Commission's proposals.

is to be valued more than this nation's civil rights jurisprudence.[254/]

This is the time to choose competition over covert prejudice, diversity over discrimination, remediation over resegregation. From its high policy perch the Commission can look back in time forty-eight years, to 1954, and remember Brown v. Board of Education,[255/] when the Supreme Court pointed us to the high road. Its decision transformed this nation, inspiring a host of federal agencies and departments to develop civil rights policies for their regulatees. The FCC can forever take pride that in 1968, it was the first agency to display its moral will and authority in civil rights.

From the mountaintop the Commission can also peer 48 years into the future, to the year 2050 when the Census Bureau predicts that the nation will be majority-minority. As every South African knows now, a nation in transformation must plan ahead to ensure that all its citizens have the opportunity to participate at all levels of government and industry. Forty-eight years is such a short time. Thirty-four calendars have closed since 1968, yet no one believes that the industry most central to our democracy has reached the Promised Land.

In 1963 President Kennedy declared "this is a moral issue" because he knew that the time for appeasement had ended. At the _____

254/ See NASBA Comments, p. 7 ("[t]he Associations believe that such re-regulation also poses a high risk of another

collision with the United States Constitution - this time, with possible widespread fatal implications for other EEO-regulated laws and regulations.")

255/ Brown v. Board of Education, 357 U.S. 483 (1954).

FCC, that time has ended too. Strong civil rights protections are not a bargaining chip to be traded away in exchange for avoidance of another trip to the courthouse. The proposed rule is constitutionally sound, so if go to court again we must, let us not be afraid. Any good thing is worth trying once and again. That's why there was a Sixth Report and Order -- to do television allotments right.[256/] That's why there was a Computer III, to do enhanced services right.[257/] That's why there were seventeen successive attempts to enact the King Holiday, to do justice right. So we say, with Milton,[258/]

> Yet I argue not
> Against Heaven's hand or will, nor bate a job
> Of heart or hope, but still bear up and steer
> Right onward.

Respectfully submitted, 259/

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256/ Sixth Report and Order in Docket Nos. 8736, et al., 41 FCC 148 (1952) (establishing television channel allotments).

257/ Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase I Order, 104 FCC Rcd 958 (1986) (subsequent history omitted).

258/ Milton (On Perseverance).

259/ MMTC appreciates the many suggestions of Dr. Everett C. Parker and Kofi Ofori, Esq.

EEO Supporters:

Minority Media and Telecommunications Council
Office of Communication of the United Church of Christ, Inc.
African American Media Incubator
Alliance for Community Media
Alliance for Public Technology
American Civil Liberties Union
American Federation of Television and Radio Artists
American Hispanic Owned Radio Association
American Indians in Film
Asian American Journalists Association
Asian American Media Development, Inc.
Black Citizens for a Fair Media
Black College Communication Association
Black Entertainment and Sports Lawyers Association
Black Entertainment and Telecommunications Association
Civil Rights Forum on Communications Policy
Cleveland Talk Radio Consortium
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Minorities in Communications Division of the Association for Education in Journalism and Communications
Minority Business Enterprise Legal Defense and Education Fund
NAMIC, Inc. (National Association of Minorities in Communications)
National Asian American Telecommunications Association
National Asian Pacific American Legal Consortium
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Black Telecommunications Professionals
National Association of Hispanic Journalists
National Association of Hispanic Publications
National Bar Association
National Council of Hispanic Organizations
National Council of La Raza
National Council of the Churches of Christ in the United States
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Indian Telecommunications Institute
National Latino Telecommunications Taskforce
National Newspaper Publishers Association
National Urban League
Native American Journalists Association
Native American Public Telecommunications
Puerto Rican Legal Defense & Education Fund
San Diego Community Broadcasting School, Inc.

Telecommunications Research and Action Center
UNITY: Journalists of Color, Inc.
Women's Institute for Freedom of the Press

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